









**RECENT DEVELOPMENTS IN  
INTERNATIONAL LAW**



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Tagore Law Lectures, 1922

# RECENT DEVELOPMENTS IN INTERNATIONAL LAW

BY

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TO

THE HON. SIR ASUTOSH MOOKERJEE,

BUILDER AND VICE-CHANCELLOR OF THE UNIVERSITY OF CALCUTTA,

JUDGE OF THE HIGH COURT OF BENGAL,

EMINENT JURIST AND SCHOLAR,

THESE LECTURES ARE RESPECTFULLY INSCRIBED.



## PREFACE

In August, 1921, the Senate of the University of Calcutta did me the honor to elect me to the Tagore Professorship of Law in that institution for the year 1922, and requested me to deliver a course of lectures on "the development of international law during the twentieth century." Subsequently, at my request, the Senate consented to allow me to interpret the subject so as to make it less restrictive as to the period to be covered, with the understanding, however, that the main emphasis should be placed on the development since the beginning of the present century. The lectures were delivered during the months of November and December, 1922, and they are here published in substantially the form in which they were originally written.

International law, like the common law of England and the United States, has grown up slowly and gradually, largely by the process of accretion, and it is not therefore easy to find a "conscious starting point," as Freeman would say, for the achievements which may be credited to a particular period or to divide the history of its growth into clearly differentiated compartments. Any such attempt would be more or less arbitrary and unscientific. It is, of course, true that the progress of the law has been more pronounced during certain periods than during others, but, as stated above, it is difficult to draw precise lines of demarcation between them, especially when they are of relatively short duration.

Ideas and movements which have come to fruition and acquired the form of objective institutions in one period have generally had their roots in earlier periods; that is to say, the results are the culmination of historical and evolutionary processes, and they can be satisfactorily studied only by beginning with their origins. In these lectures an effort has been made



to trace and evaluate some of the more important developments, which, originating in more remote times, have attained their present state since the opening of the twentieth century. I am quite aware that much of that which has taken place during this comparatively short interval of time cannot properly be regarded as "development" in any true sense of the word. Much of it belongs more properly to the domain of "interpretation" and "application," and some of it has in fact represented retrogression rather than progress. What I have endeavored to do is to discuss the actual interpretation and application of the law, as well as its development, to signalize the divergencies of opinion and of practice which have prevailed and which still prevail among states as to what the law is or should be, to indicate the principal tendencies which have characterized the recent history of international law and to venture some observations on the probable future lines of development in the light of new and rapidly changing conditions.

A study of the recent history of international law will show that its development has consisted less in the formulation of new law than in the extension of its domain to new relationships, the adaptation of old rules to new conditions and the reaching of agreement upon rules concerning matters about which there has been a divergence of opinion among states. This latter process has involved the work of codification in the larger sense of the word, and as such, it represents the most substantial progress that has been achieved. Through it, differences of opinion have been reconciled and many customary rules and usages have been reduced to written form and embodied textually in formal conventions. Much of the law hitherto falling within the somewhat vague and nebulous domain of custom has thus been "declared" and given definiteness and precision of statement. Side by side with the progress of codification in the sense in which the term is here used has gone the development of agencies and processes for the peaceable settlement of international controversies, the ultimate object of which is

the substitution of a system of law and justice in the place of force and violence as the basis of international conduct. Parallel with these movements has proceeded also the effort to give the "family of nations" a legal organization with common administrative, legislative, and judicial organs. By the establishment of the League of Nations, this age-long dream has now been, in part, realized. The effect of the covenant has been to alter some of the fundamental bases on which international law has heretofore rested, to establish new conceptions of international duty, to shift the emphasis more and more from the rights of states to their obligations and responsibilities, and to exalt the idea of interdependence and solidarity at the expense of nationalism and independence.

Some of those who do me the honor to read these lectures will probably reproach me for having devoted an undue proportion of space to the consideration of that part of international law commonly called the "law of war" and too little to the "law of peace." But it must be remembered that the more recent developments have related much more largely to the law of war than to the law of peace and it is inevitable therefore that the former should receive the preponderance of consideration. During the last half-century the controversies that have raged, the discussion that they have provoked, the solutions that have been sought, the efforts that have been put forth to improve the law and the conventions that have been formulated, have been confined, in the main, to the part of the law which deals with the conduct and relations of states in time of war. Throughout this period the law of peace has undergone relatively slight change or development, and conferences and jurists have, unfortunately, occupied themselves too little with its improvement. The law of war has largely monopolized the field, and the perfection of the law of pacific relations has been sadly neglected. Had the preoccupations of statesmen and jurists in this respect been otherwise, the necessity for a law of war might be less imperative than it is generally believed to be.

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Before terminating these remarks, I desire to express my deep appreciation to the Senate of the University of Calcutta for the honor which it did me in electing me to the Tagore Professorship, to the faculty and students who attended and listened to my lectures, and above all to the Hon. Sir Asutosh Mookerjee, Vice-Chancellor of the University, and one of India's most eminent jurists and distinguished scholars, for his numerous courtesies to me during my stay in Calcutta. On account of the long delays which would have been involved in sending the proofs to me in America I have left the proof reading to others. This task was generously and conscientiously performed by my friend, Mr. R. N. Gilchrist, late Professor of Political Science and Political Economy in the Presidency College of Calcutta, to whom I wish to acknowledge my very great debt of gratitude.

UNIVERSITY OF ILLINOIS,

*March, 1923.*

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JAMES WILFORD GARNER

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## SOME ABBREVIATIONS USED IN THE FOOTNOTES

*Amer. Jour.* = American Journal of International Law.

*Annuaire* = Annuaire de l'Institut de Droit International.

Clunet = Clunet's Journal de Droit International.

*Jour. of Soc. of Comp. Leg.* = Journal of the Society of Comparative  
Legislation and International Law.

Moore, *Digest*—Moore, Digest of International Law.

*Rev. Gén.* = Revue Générale de Droit International Public (ed.  
Fauchille).

*Rev. de Droit Int.* = Revue de Droit International et de Législation  
Comparée (ed. de Visscher).



# LECTURE I

## Recent and Present Tendencies in the Development of International Law.

I approach the task of attempting to review and evaluate the more important recent developments of international law, in the spirit in which Sir Robert Phillimore tells us he entered upon the preparation of his monumental treatise, namely, that international law is a "noble science," whose object is the ultimate achievement of the supremacy of right, and that there can be "few nobler objects of contemplation and study" than to trace its growth from "a few simple rules to the goodly and elaborate fabric which it now presents."<sup>1</sup>

In this, my first lecture, which is intended to serve as a background to those which follow, I purpose to discuss summarily the present state of international law, considered both as a science and as a system of jurisprudence, to indicate some of the lines along which it has developed in more recent times and the forms which that development has taken, to call attention to the more important defects which inhere in the system in its present state of development and to attempt to foreshadow some of the lines along which its future growth will probably follow.

International law is no longer regarded as Kant conceived it: "a word without substance" or as Von Clausewitz characterized it: "a body of self-imposed restrictions, almost

<sup>1</sup> Preface to his *International Law*, pp. xiv and li.



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imperceptible and hardly worth mentioning."<sup>1</sup> On the contrary, it is, as Francis Lieber said, one of the greatest "blessings of modern civilization."<sup>2</sup> It constitutes one of the highest manifestations, and at the same time, is one of the most notable achievements of that civilization.<sup>3</sup> There are still a few who belittle it and deny it the dignity and character of law; there are some still who regard it as nothing more than "international morality" or "international etiquette,"<sup>4</sup> the prescriptions of which states are at entire liberty to observe or disregard at their will, and that it is largely a waste of time to attempt to formulate its rules and embody them in conventions. But usually those who utter this cry of despair, in fact, have in mind only that part of international law which is intended to regulate the abnormal conduct of states in time of war and not at all that other large and more important part which deals with their relations in time of peace. Not even its severest critics would pretend that the latter part of the law is any less generally and scrupulously observed than the rules of municipal law or that it has subserved in any less

<sup>1</sup> See his *Vom Kriege* (Eng. Trans. by Graham), Vol. I, p. 2.

<sup>2</sup> Perry, *Life and Letters of Francis Lieber*, quoted by Greene in his *Lieber and Schurz*, p. 17.

<sup>3</sup> Compare Pillet, *La Guerre Actuelle et le Droit des Gens*, 23 *Rev. Gén. de Droit Int. Pub.*, p. 5.

<sup>4</sup> Lord Salisbury said in 1887: "International law has no existence in the sense in which the term 'law' is usually understood; it depends generally upon the prejudices of writers of text-books; it can be enforced by no tribunal and therefore to apply to it the term 'law' is to some extent misleading." *London Times*, July 26, 1887, quoted by Walker, *Science of International Law*, p. 1. Even Lorimer, who wrote a ponderous and valuable treatise on the subject, denied as late as 1884 that there was "any positive international law at all," mainly because it "is neither defined nor enforced by any authority superior to that which its subjects retain in their own hands." *Institutes of the Law of Nations*, Vol. II, p. 189. The late President Roosevelt once referred to "that large body of rules misleadingly called international law" but later he severely criticised neutral powers for their failure to protest against its violation by Germany when she invaded Belgium. See his article in the *Metropolitan Magazine*, October 1915.

degree the purposes for which it was created. The whole body of the law has been thrown into more or less discredit by every great war that has occurred since its rules took form, because men have usually judged its efficacy as a whole by the strength of its weakest part. Whenever an established rule of conduct has been violated by a belligerent under the stress and strain of war, the prestige of the whole system has suffered from the attacks of indiscriminating critics, who think of international law as mainly a body of rules for the regulation of the conduct of states which happen to be at war.

The development of international law, and especially that part which we call the law of war, has therefore lacked the steadiness which characterizes the uninterrupted flow of a stream; it has rather been a development marked by alternate periods of progression and stagnation; at times, its growth has been arrested or retarded by great international crises, which rudely shook its foundations and tended to undermine public confidence in its utility; but each time it has recovered from the setbacks which it received, and emerged successfully from the state of discredit into which it had been temporarily thrown, and each time it has advanced beyond all points hitherto attained. If, therefore, we regard the whole period of its development we shall see that it has been characterized by remarkable continuity of growth and progress.

By the close of the nineteenth century certain fundamental questions as to its character, about which controversies had once raged, had practically ceased to be matters of dispute. The old controversy to which Austin's conception gave rise as to whether international law is law in the strict sense of the term, since it lacks certain of the ear-marks which municipal law possesses, or whether it is nothing more than international "morality" or "comity"—a controversy which was never much more than a question of definition and terminology—has ceased to have any practical interest. All jurists now admit that the Austinian conception was too narrow and arbitrary, since it

unduly emphasized the element of physical sanction, and ignored the large body of custom which the courts regard as law but which was never formally enacted by a legislative body.<sup>1</sup> To deny the character of law to rules which all foreign offices and governments treat as law and to which they appeal in their controversies with one another, which have developed through judicial precedent or which have been formulated by international congresses, which have been elucidated and expounded by trained jurists, which are applied by national and international tribunals and which states in fact regard as binding upon them, is to adopt a conception of the nature of international law which is in contradiction with the facts of international practice.<sup>2</sup>

A more important question which has been the subject of prolific discussion but which may now be said to have

<sup>1</sup> Compare Scott, 1 *Amer. Journal of Int. Law*, especially pp. 837-839, also the preface to his *Cases on International Law* (1922), Oppenheim, 2 *Amer. Jour.* pp. 330-31; Westlake, *Collected Papers*, pp. 14 and 396; Hershey, *Essentials of Int. Law*, p. 6; and Munroe Smith, 12 *Amer. Pol. Sci. Rev.*, pp. 1 ff.

<sup>2</sup> Compare Munroe Smith, "Nature and Future of International Law," 12 *Amer. Pol. Sci. Review*, p. 2; Root in *Procs. Amer. Soc. of Int. Law*, 1908, p. 15; also the remarks of Manning, *Law of Nations* (p. 89), who said in 1839: "as a fact the law of nations is constantly appealed to; and has been usually obeyed; it has been recognized as a body of law for the guidance of nations in a great variety of state papers; it has been acknowledged as binding by an express act of the legislature of the United States.....it has even been recognized at the very moment of its violation; and the sovereigns who have broken through its restraints have invariably acknowledged its existence, by the manner in which they have attempted to make their violence appear consistent with its institutions." Compare also Amos, *Lectures on International Law* (1874), quoted in Manning, p. 90, who after dwelling upon the great service of international law both in time of war and in time of peace concludes: "it might be sufficient in final refutation of the notion that international law is a fiction, to cite the most important English statutes which have recently been passed in order to enforce upon English citizens the duty of co-operation with the state in complying with international obligations, and the records of recent litigation in the highest English courts arising solely out of disputed questions of international law."

ceased to be a subject of controversy is as to the relation between international law and municipal law. The highest courts of England and the United States have held for more than a century, that international law is an integral part of the municipal law of both countries and must be ascertained and applied by the courts of justice in cases where there is no treaty or rule of municipal law covering the issue involved.<sup>1</sup> In the very last year of the nineteenth century this principle was definitely affirmed by the United States Supreme Court, and it may now be regarded as settled.<sup>2</sup> Incidentally the Court laid down the important principle that a practice which was regarded as a mere matter of "comity" a hundred years ago had through long and constant usage acquired the force of a "settled rule of international law" to which the court was bound to give effect as a legal right.<sup>3</sup>

Indeed, in late years, the doctrine of the courts, that international law is a part of the municipal law of every state which is a member of the international society, has been formally incorporated in the national constitutions of a number of states so as to remove all doubt as to the relationship. Thus the new constitutions of the German and Austrian republics expressly declare that the generally recognized principles of the law of nations are accepted as an integral part of the law of both commonwealths.<sup>4</sup> The constitutions of a number of Latin American states contain similar affirmations.<sup>5</sup>

While this view of the relation between international law and municipal law is now universally admitted, it is of course,

<sup>1</sup> The opinions of the courts and the views of commentators are fully reviewed by Scott in his article on "The Legal Nature of International Law," in *1 Amer. Jour. of Int. Law*, pp. 858 ff.

<sup>2</sup> *The Paquete Habana*, 175 U. S. 677 (1899).

<sup>3</sup> Compare the observations of Professor J. B. Moore, *1 Amer. Jour. of Int. Law*, p. 11.

<sup>4</sup> German Constitution, art. 4 ; Austrian Constitution, art. 9.

<sup>5</sup> For example those of Colombia, 1863, and of San Domingo, 1896 (art. 106). The principle is recognized though not directly affirmed by

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subject to the qualification that a rule of international law, in order to be entitled to recognition as a part of the municipal law of a state, must be one which is generally admitted to be a universally established rule, rather than one which is followed and applied only by a limited number of states. The English courts, indeed, assert that the rule must be one to which the state has given its assent either expressly, or impliedly, and must "like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it."<sup>1</sup> This reservation has led some writers to maintain that when national courts adopt, apply and enforce the principles of international law, they regard them not as rules of international law but as municipal law, that is, their legal force is derived

the constitutions of other Latin American states. See J. B. Moore, *Procs. Amer. Soc. of Int. Law*, 1915, pp. 14-15. The constitution of Venezuela of 1904 (art. 125), however, declares that "international law is supplementary to national legislation; but it can never be invoked against the provisions of this constitution and the individual rights which it guarantees." In the proposed "fundamental bases of international law" submitted to the American Institute of International Law in 1917 we find the following declaration: "International law constitutes a part of the national legislation of each state" (art. 3). *Acte Finale de La Session de la Havane*, p. 68.

<sup>1</sup> Cockburn, C. J. in *Queen v. Keyn* (1876) and *West Rand Gold Mining Co. v. King* (1905). In the early case of the *General Smith* the United States Supreme Court stated that the "general maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country." And it added: "In this respect it is like international law or the laws of war which have the effect of law in no country further than they are accepted and received as such." But in the later case of the *Paquete Habana* (1905), the Supreme Court affirmed broadly that "International law is a part of our law" without making any reservation as to the necessity of its having been accepted, received or acted upon by the United States. And in the case of the *La Princesa* (14 Wallace 170) the Supreme Court stated that "the law of nations, unlike foreign municipal laws, does not have to be proved as a fact."

from the fact that they have been adopted by the state whose courts are called on to enforce them.<sup>1</sup> The theory of "acceptance and adoption," it must be admitted, is probably in accord with the practice of states. It is not likely, for example, that the courts of England would apply a rule of maritime law which was contrary to the traditional views and usage of the country even though it had the sanction of approval and usage of all other countries. The courts of the United States would probably adopt the same view, notwithstanding the frequently enunciated doctrine that international law is a part of the municipal law of the country and that its acceptance as such is one of the essential conditions under which a state is originally received into the family of nations.<sup>2</sup>

But it does not necessarily follow that because national courts insist that the rules which they apply shall have been received and acted upon by their own state, those rules are therefore merely rules of municipal law. It is quite true that prize courts administer municipal law and when there is a conflict

<sup>1</sup> Such is the thesis of Professor Willoughby in an article entitled "The Legal Nature of International Law" in *II Amer. Jour. of Int. Law*, pp. 357 ff.

<sup>2</sup> Sir Henry Maine, in his *International Law* (p. 38) referring to the views of American statesmen that international law is a part of the municipal law said: "They look upon its rules as a main part of the conditions on which a state is originally received into the family of civilized nations. This view, though not quite explicitly set forth, does not really differ from that entertained by the founders of international law, and it is practically that submitted to, and assumed to be a sufficiently solid basis for further inferences, by governments and lawyers of the civilized sovereign communities of our day. If they put it in another way it would probably be that the state which disclaims the authority of international law places herself outside the circle of civilized nations." Almost at the time when Sir Henry's work containing these observations was being published, the government of the United States addressed a protest to the government of Ecuador against a law recently passed by the Congress of that country which was pronounced as "subversive of the principles of international law by which, and not by domestic legislation, the ultimate liability of governments to one another must be determined," and declaring that "by such a declaration of rules for the guidance of her conduct in international relations Ecuador places herself outside of the pale of international intercourse." Moore, *Digest*, I, p. 6.

between a rule laid down by the municipal law of their state and a rule of international law, they apply the former rule rather than the latter, but they also administer international law when there is no municipal law, and when they do so, they regard it as international law and not as municipal law.<sup>1</sup> Lord Stowell again and again so affirmed,<sup>2</sup> and so did the Privy Council in the case of the *Zamora* during the World War. The Privy Council in the latter case readily admitted that prize courts are municipal courts but at the same time it asserted, in no uncertain terms, that the law which they administer, except where they are obliged to apply acts of Parliament which are contrary to international law, is international law and not municipal law.<sup>3</sup> The great majority of English and American text writers also adopt this view.<sup>4</sup>

Nevertheless while national courts administer international law they do so only when there is no treaty or rule of

<sup>1</sup> Compare Bellot, "The Law of the Prize Court," *Jour. of the Soc. of Comp. Leg. and Int. Law*, 1919, p. 3, who readily admits that prize courts are national tribunals, but who adds that "they are created not for the purpose of enforcing national law only but also international law."

<sup>2</sup> See especially the cases of the *Maria* (1799) 1 C. Rob. 340 and the *Fox* (1811) Edwards 311.

<sup>3</sup> The *Zamora* C. P. C. I. See especially the remarks of Lord Parker on this point; also the observations of J. B. Scott in 10 *Amer. Jour.*, p. 563, and of Pyke in 16 *Jour. of Soc. of Comp. Leg.*, p. 102. It may be remarked that in the case of the *Kronprinzessin* (1918) the Privy Council referred to the prize court as an "international tribunal."

<sup>4</sup> Some of them are cited by Oppenheim, *International Law* (3rd ed.) Vol. II, p. 268. See also Westlake's conclusions (*Collected Papers*, p. 518). This also seems to be the view on which the courts of the United States have proceeded. But Professor Quincy Wright asserts, on the contrary, that Chief Justice Marshall always maintained that the courts applied "national law alone" and he cites the case of the *Schooner Exchange*, in support of the statement. See his *The Enforcement of International Law through Municipal Law*, p. 225. This case does not seem to me to justify his conclusion, but Professor Wright remarks that the regard which Marshall showed for international comity and his assertion that international law was a part of the law of the United States and must be applied unless changed by positive legislation, afforded evidence that he was influenced by "the theory of the higher law."

municipal law by which the case may be determined. If there is such a rule the court must apply it even when it is in contravention of an established principle of international law. In other words, the courts do not yet admit the supremacy of international law. This view is now followed by the courts of all countries and it has the approval of most of the authorities. Municipal statutes have by no means been lacking which were admittedly contrary to the established rules of international law,<sup>1</sup> but there appears to have been no instance in which a national court ever disregarded a statute and applied the rule of international law.<sup>2</sup> On the contrary, national courts have always regarded themselves as bound by municipal statutes.<sup>3</sup> This view was affirmed by the English Privy Council in the *Zamora* case. In this case the Privy Council declared that prize courts are not bound by executive orders contrary to the established rules of international law, and that it is for the court to determine for itself to the best of its ability what the law is and not to take directions from the Crown even in doubtful cases. Nevertheless, the Privy Council affirmed that prize courts are bound by the legislative enactments of their own country even when they are contrary to international law, although in such a case they would not be administering international law but municipal law. In brief, while Parliament may oblige prize courts to apply rules of municipal law which are in violation of international law, the

<sup>1</sup> For example an act of the American Congress of March 3, 1863, permitting the requisition of neutral vessels before condemnation, against which the British government protested as being in violation of international law but which the Attorney General of the United States held to be binding upon the authorities; also certain acts of Congress forbidding the killing of fur seals in the Behring sea against which the British government protested on the same ground.

<sup>2</sup> Compare Wright "Conflicts of International Law with National Law and Ordinances," 11 *Amer. Jour. of Int. Law*, p. 7, where the authority and practice are luminously discussed.

<sup>3</sup> See notably the cases of *Mortensen v. Peters* (1906) 14 Scot, L. T. R. 227 and the *Charming Betsy*, 2 Cranch 64.



Crown has no such power. The German prize court however, adopted a different view during the World War, in the case of the *Zaanstroom*, where it held that prize courts are "national tribunals established by their own states to determine whether the organs of the state carrying on maritime war have complied with the rules which they have been instructed to follow and to pass on the legal consequences of their acts. From this it follows, that nations have to judge according to the law prescribed by their own state, regardless of whether this law is in harmony with existing principles of international law or not. Whether this is so or not, is not the province of the prize court to determine, but is left to the belligerent state which is alone responsible in this regard to other states."<sup>1</sup> In this and other cases decided by the German prize courts the rule was definitely affirmed that national courts are bound not only by legislative enactments of their own states, whether they are in accord with international law or not, but also by orders and regulations issued by the executive authorities. In short, the German prize courts recognized no distinction between legislative enactments and executive ordinances or instructions, both being equally obligatory upon them, as well as superior to international law. The French prize council during the world war appears to have adopted the same view,<sup>2</sup> and so did the Italian prize commission.<sup>3</sup> It would seem, therefore, that the former

<sup>1</sup> Huberich and King, *The Development of German Prize Law*, 1918. Text of the decision in *Annuaire Grotius*, 1916, pp. 200 and 230. A similar conclusion was reached by the German prize court in the cases of the *Batavier V* and the *Elida*. English text of the decision in the case of the *Elida*, 10 *Amer. Jour.*, p. 916 ff.; German text in IX *Zeitschrift für Völkerrecht*, 109.

<sup>2</sup> Notably in the cases of the *Eir* and the *Ariadne*. See Fauchille, *Guerre de 1914, Jurisprudence Française en Matière de prises Maritimes*, pp. 32 and 109.

<sup>3</sup> The Italian prize instructions of July 15, 1915 and of March 25, 1917, especially the latter, contained various rules which constituted departures from the corresponding rules of the Hague Conventions. (See the texts in Fauchille and Basdevant, *Jurisprudence Italienne en Matière de Prises Maritimes*, 1918, pp. xviii ff. and xlv ff. and the accompanying

difference between the continental view which accepted without qualification the dictum that international law is a part of municipal law and must be applied by national courts, and the English view that qualifications are necessary, is in the process of disappearing, since continental states now, like England and the United States, accord precedence to municipal law over international law.<sup>1</sup> As the doctrine and practice now stand the supremacy of international law does not exist in the sense that national courts may disregard the law of their own state when in their opinion it is repugnant to the prescriptions of international law. The latter law is still *inter-national* and not *super-national*.<sup>2</sup> It is possible that in the course of the further evolution of the law and of international organization it may ultimately become supranational, but so far as the right of the courts to treat it as such is concerned the tendency in recent years has rather been in the opposite direction.

report.) But the prize commission considered the instructions as obligatory upon it. See especially the cases of the *Kysicas*, the *Ambra*, and the *Moravia*, in Fauchille and Basdevant's collection referred to above, pp. 59, 103 and 183. See also the review by Colombo in *Int. Law Assoc. Report*, 1921, Vol. I, p. 31.

<sup>1</sup> In practice states do not follow either theory to its logical conclusion since the view adopted usually depends upon various circumstances, such as whether the rule of international law in question is conventional or customary, whether the rule of municipal law, in case it is a question of conflict, is found in a constitution, a statute or a judicial decision or an executive order, etc. Compare Kaeckenbeck, IV *Grotius Society Transactions*, p. 221; Q. Wright, 11 *Amer. Jour. of Int. Law*, pp. 4 ff., and Alvarez, *La Codification du Droit International*, pp. 71 ff.

<sup>2</sup> The late Alpheus H. Snow criticised the term "international" law as "self contradictory and unscientific" on the ground that that which is international cannot be "law" and that which is "law" cannot be "international." Agreements and relationships, he said, might be "international" but "law" could not be. He therefore proposed the replacement of the term "international" law by the term "supernational" or "supranational" law. See his articles in 6 *Amer. Jour. of Int. Law*, p. 892, and 7 *ibid*, pp. 315 ff. See also the remarks of Hull in *Procs. of Amer. Soc. of Int. Law*, 1911, pp. 280-289, where a distinction between "international," "extra-national" and "supranational" law is suggested. It may be doubted, however, whether the suggested changes of terminology would be justified until the present conception of the character of the law itself has changed.

It does not follow however, from the admitted right of states to compel their courts to apply their own law when it is in contravention of international law that they have a right to enact and enforce law which clearly violates universally recognised principles of international law. It is believed that the position of the United States was incontrovertibly sound when in its protest against the Ecuadorean law referred to above, it affirmed that the responsibility of states toward one another is determined by international law and not by their own law and that the state which acts upon the contrary principle places itself outside the pale of international intercourse. National courts themselves while readily admitting their obligation to apply municipal legislation which conflicts with international law have regretted the necessity and have usually endeavored by interpretation to construe such legislation as not being in conflict with international law.<sup>1</sup> In other words, they have interpreted the law, wherever possible, in such a way that it would not amount to a violation of international law.<sup>2</sup> And the English Privy Council has, as

<sup>1</sup> Thus in the case of the *Charming Betsy* (2 Cranch 64) Chief Justice Marshall interpreted the non-intercourse acts of Congress as not authorising extra-territorial seizures of ships in time of peace. British courts have avoided interpretations of acts of Parliament whose meaning was doubtful, that would otherwise violate the comity of nations and they have proceeded on the presumption that there was no intention of parliament to contravene international law. See for example Lord Kyllachy's opinion in *Mortensen v. Peters*, 14 Scot. L. T. R. 227 (1906). So also Lord Stowell interpreted the British navigation acts as not having been intended to apply to foreign vessels seized *jure belli*, although they were clearly applicable to British merchant vessels. *The Recovery*, 6 Rob. 341 (1807). See on this matter the remarks of Professor Quincy Wright in 11 *Amer. Jour. of Int. Law*, p. 10 and Picciotto, *The Relation of Municipal to International Law*, pp. 27 ff.

<sup>2</sup> Professor Borchard asserts that the Latin American view is however, otherwise. Adverting to a provision in the constitution of Venezuela (art. 125) which declares international law to be merely "supplementary" to national law he remarks that "the states of Latin America maintain the supremacy of their own laws in international matters. Therefore, they assert that while international law may *aid*, it can never dictate, control or determine any matter which is in conflict with their own

we have seen, emphatically denied the right of the Crown to impose upon prize courts an obligation to give effect to orders in council which are contrary to international law. This remarkable assertion of independence on the part of the Privy Council has been widely praised as a distinct triumph for the cause of international law. In reality, however, it was a question of constitutional law rather than of international law. The Council frankly admitted that Parliament might pass an act contrary to international law and in such a case the court would be bound to apply the act. To foreign nations concerned it makes no difference whether a rule of international law is violated by an act of Parliament or an order in council; what their own interests require is that it shall not be violated by either and if it is, the act shall not be enforced by the courts.<sup>1</sup>

The development of international law since the middle of the last century has been characterised by a marked tendency in the direction of unity of conception in respect to its fundamental character and processes of interpretation. There are now, however, and always have been "schools" of international law, but the lines of demarcation which differentiate them have more and more lost their importance. The "naturalistic" school of which the Scotch jurist Lorimer may be said to have been the last representative has practically disappeared. His conception of international law as "the law of nature realized in the relations of separate states" and his thesis that there "is no positive international law at all"<sup>2</sup> has no advocates to-day.

statute law." *Diplomatic Protection of Citizens Abroad*, p. 157. If this means the assertion of a full right of states to determine their own conduct without regard to the obligations of international law it places those states in a class apart from the United States and Europe where as the protest of the diplomatic representatives of the latter powers against the Ecuadorean law mentioned above shows, a different view prevails.

<sup>1</sup> Compare the remarks of Scott, 10 *Amer. Jour.*, p. 563.

<sup>2</sup> See his *Institutes of the Law of Nations*, Vol. I, p. 1 and Vol. II p. 189. Also his communication to the Institute of International Law in

Traces of the influence of the so-called "law of nature," are, however, not entirely lacking,<sup>1</sup> and there are still a few who maintain that "while you may drive it out of the front door it will manage to gain fresh entrance through the back door or the windows." But ordinarily when jurists to-day invoke the law of nature they have in mind nothing more than the dictates of justice and right as they are founded on reason and the nature of things.<sup>2</sup> As Oppenheim remarks, the theory of the "law of nature" as a system of jurisprudence has been "shaken off" and the "positivists" who not only defend the existence of a positive law of nations embodied in custom and conventions but who regard it as by far the most important part, have gained the supremacy.<sup>3</sup> Grotians or Eclectics are still not lacking<sup>4</sup>

1883 (7 *Annuaire*, 231) where he distinguished between the English and Scotch "schools of jurisprudence." See also the criticism of his views by Rolin-Jaequemyns in 17 *Rev. de Droit Int.*, pp. 527 ff.

<sup>1</sup> Compare Reeves "Influence of the Law of Nature upon International Law in the United States," 3 *Amer. Jour.*, pp. 547 ff.

<sup>2</sup> Compare Brown, *International Realities*, p. 9. This was what an eminent American jurist, Mr. James C. Carter, undoubtedly had in mind in his argument before the fur seal arbitration tribunal in 1893 when he appealed to the "law of nature" as a defense to the claim of the United States to protect from destruction fur-bearing seals in the Behring sea. If a case arises, he said, for which the usages and practice of nations furnish no precedent, it is not to be inferred that no rule exists. A rule is then to be drawn from the dictates of natural justice, to which nations are presumed to yield their consent. If neither the practice and usages of nations nor the judgments of the courts provide a rule the tribunal should look "to the great source from which all law flows, the dictates of right reason, natural justice; in other words, the law of nature." Moore, *Hist. and Dig. of Int. Arbitrations*, Vol. I, pp. 828-829.

<sup>3</sup> *International Law*, (3rd ed.), Vol. I, pp. 105, 114. Oppenheim elsewhere remarks that "the law of nature has played its part." "Enormous as the importance and the function of the theory of the law of nature has been for the past, it is for our times not only without any value whatever but directly detrimental" and he adds that its place is not in the text books, law schools and universities but in the museums. "The Science of International Law," 2 *Amer. Jour.*, p. 329. Compare also Lawrence, *Principles of Int. Law*, sec. 25.

<sup>4</sup> For example Bonfils and Despaget. See Fenwick "Two Representatives of the Grotian School," 8 *Amer. Jour. of Int. Law*, p. 38 and Oppenheim, 2 *ibid.*, p. 239.

though the number is not large and they are hardly found at all in England and America. Some writers still emphasize the distinction between "schools" of international law each of which holds views differing from the others in regard to the fundamental character of international law, its relation to international law, methods of interpretation, etc.<sup>1</sup> The lines which divide these schools are in the main national or continental. Thus in England and the United States the positivist view regarding the source of international law, the manner of establishing its rules, the value which should be accorded to precedents, and the desirability of codification have differed from the views generally held on the continent of Europe. So the general Latin American view in regard to the relation between international law and municipal law has differed somewhat from the view which prevails in England and the United States. According to some writers, the views of German, French and Italian jurists differ so widely that they may be said to constitute separate "schools." It is believed, however, that the divergencies of view of some of the so-called schools have been over-emphasized. At any rate, whatever the differences may have been in the past they have tended more and

<sup>1</sup> M. Alvarez states that there were "not less than six schools of international law" during the nineteenth century: the English school, the American, or more properly, the North American school, the German school, the Italian school, the French school and the Latin American School. See his *La Grande Guerre Européenne*, (1915), p. 43; also his *La Codification du Droit International* (1912), p. 8 and his *Le Droit International Américain* (1910), p. 2. But M. Alvarez admits that there are now only three important schools: the Pan-American, the Anglo-Saxon and the Continental, Latin or French schools. See his article "Le Nouveau Droit des Gens," 47 *Rev. de Droit Int.* (1920), p. 153. The Latin and Anglo-Saxon schools are distinguished, he says, the one from the other, by important differences of doctrine and methods of study. While the first emphasizes juridical principles, makes constructions *d'ensemble* and neglects policy, the Anglo-Saxon school, on the contrary, repudiates principles and collective constructions and prefers the study of concrete cases; it emphasizes policy and practice at the expense of law. The Pan-American school occupies itself with special problems and professes doctrines not accepted on the continent of Europe or in Anglo-Saxon countries.

more in recent years to disappear. Between the opinion, tradition and practice prevailing in England and the United States and that on the continent of Europe, however, the divergencies have been and still are so important that the distinction usually made between the Anglo-American "school" and the continental "school" has some justification.<sup>1</sup> Reference has already been made to their differences of view regarding the relation between international and municipal law. There is also a fundamental difference between the Anglo-Saxon and the Continental process by which the rules of international law are ascertained. English and American judges look first of all to the judicial decisions; they search for precedents established by the courts and when one is found it is followed, rarely without deviation, even when reason and abstract justice may point in the other direction and even when the precedent has ceased to be in accord with the generally accepted rule of international law.<sup>2</sup> The result is that not a little of the English and American authority on various matters, such for example as commercial intercourse with the enemy, the right of enemy aliens to sue in the courts and the like, is obsolete or out of harmony with current conceptions, but "being embodied in case law it has not been swept away."<sup>3</sup> On the continent, however, judicial precedents are not regarded with the same authority, more emphasis being placed upon the opinions of publicists and

<sup>1</sup> Compare Alvarez, *La Grande Guerre*, etc., p. 43.

<sup>2</sup> But in 1914 the British prize court in the case of the *Berlin* (L.R., 1914, p. 265) overruled the precedent set by Lord Stowell that fishing vessels of the enemy are liable to capture. In the former case Sir Samuel Evans said: "but after the lapse of a century I am of opinion that it (the immunity of such vessels) has become a sufficiently settled doctrine and practice of the law of nations." It may also be said that the British courts during the World War greatly attenuated if they did not overrule the doctrine laid down by Lord Stowell in the case of the *Hoop* in regard to the *persona standi in judicio* of enemy aliens. See the cases of *Porter v. Freudenberg*, 1 K. B. 857 and *Schaffenus v. Goldberg* and the discussion in my *International Law and the World War*, Vol. I, pp. 123-127. See also Q. Wright, in 11 *Amer. Jour.*, p. 18.

<sup>3</sup> Compare Bentwich, *The Law of Private Property in War*, p. 50.

text writers, which in England and America count little as against the decisions of the courts.<sup>1</sup> On the continent, reliance upon the Roman law and the law of nature is also much more common than in the United States and England.<sup>2</sup> Moreover the processes of interpretation on the continent differ fundamentally from those in England and the United States. In the latter countries the interpretation of the law is more strict, extrinsic evidence of a historical nature not usually being allowed. The judge cannot speculate on what the

<sup>1</sup> But as Professor Hall justly remarks ("Precedents in International Law," 26 *International Journal of Ethics*, p. 153) there has been an increasing disposition among continental courts to cite judicial decisions and a visible reluctance to depart from them, so that in fact the difference between the continental and American systems is more largely one of degree.

<sup>2</sup> Compare Kaeckenbeck "Divergences between British and Other Views on International Law," IV *Grotius Society Transactions*, p. 222. This writer calls attention to the differences between the English and the French points of view regarding the value of judicial precedent as they were revealed by the memoranda submitted to the International Naval Conference of 1909. The British memoranda contained references to numerous decisions by the courts as sources of the rules of international law, whereas the French memoranda omitted all such references to French cases "owing to the different principles of French law." "Whatever the authority of jurisprudence" (that is judicial decisions), said the French note accompanying the memoranda, "and however constant it may be on such rules and such a point of law, it does not constitute juridical rules obligatory upon the totality of citizens or for the courts, and it is not considered as constituting an element or a source of law." And it added that it was the duty of the judges to depart from precedents whose experience demonstrated their inconvenience.

As to the value of text writers in the United States as authorities, see the opinion of the Supreme Court in the case of the *Paquete Habana*, where it was said they were resorted to as "evidence" of the customs and usages of civilized nations, not for the speculations concerning what the law ought to be. In the *West Rand Gold Mining Case* the Lord Chief Justice of England, referring to the necessity of international law being "recognized" in England before it could be applied by the courts, said: "The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient." Chief Justice Cockburn, referring to the same necessity, said in the case of *Queen v. Keyn*, "No unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements."



legislator meant to say.<sup>1</sup> On the continent the influence of the Roman law, the law of nature and codification of the law have led to a different method. There the historical method finds more favor, and interpretation by analogy is not infrequent. The training of American and English judges in case law causes them to think *in concreto*, while the French jurist, in particular, is more influenced by abstract and philosophical conceptions. The latter cares less for precedents encased in ancient decisions than he does for principles worked out by publicists and text writers.

English views in respect to the content of international law differ quite as much from those generally held on the continent as do their opinions concerning the more fundamental matters relating to the nature, sources, and mode of ascertaining the rules of international law. This is the case in respect to such questions as the acquisition and loss of nationality, theories of jurisdiction, the test of enemy character for purposes of capture and intercourse, the legal effects of the outbreak of war, belligerency and insurgency, the extradition of nationals, the status of merchantmen in foreign ports, commercial intercourse with the enemy, certain matters relating to blockade and contraband, transfers of flag, the conversion of merchant vessels into war-ships on the high seas, immunity of private property from capture at sea, immunity of convoyed ships from search, destruction of neutral prizes, and various other matters of maritime law.<sup>2</sup> As regards a good many of these matters the American view is substantially the same as that which prevails in England,

<sup>1</sup> Compare Kaeckenbeck, art. cited, p. 223, and the authorities there referred to. Compare in this connection the English *versus* the continental interpretation of article 23 (*h*) of the Hague convention No. IV, which was apparently intended to forbid belligerents from closing their courts to enemy subjects in time of war. Discussed in my *International Law and the World War*, Vol. I, pp. 119-124.

<sup>2</sup> The extent and character of some of these and other divergences are discussed by Kaeckenbeck in *IV Grotius Society Transactions*, pp. 224 ff.

but as to others it is opposed to the British view, and is more in accord with the continental view.

As to the universality of the rules of international law there is still some difference of opinion although it is not important. For a long time it was customary to distinguish between the "public law of Europe," and that of the rest of the world<sup>1</sup> and even to-day some publicists appear to recognize the distinction.<sup>2</sup> Formerly, when the society of nations included few or no states outside Europe, international law was in fact mainly European but with the enlargement of the circle to embrace a large number of states in America and Asia, international law ceased to be European and became universal, or nearly so, in its application. There are still, however, some writers who defend the thesis that international law is both universal and regional, that is, some of its rules are of universal application while others are limited to particular continents. Thus M. Alvarez, a distinguished Latin American jurist, maintains that there are some rules which are universally applicable, that there are some which apply only to the states of Europe, and there are others which are peculiar to the states of America. He even maintains that there is an Asiatic and an African international law.<sup>3</sup> There exist in Europe, he contends, various international problems and situations which are peculiar to this group of states and in consequence there has grown up a body both of customary and conventional law dealing with them

<sup>1</sup> Heffter, *Le Droit Int. de l'Europe*, sec. I; Klüber, *Droit des Gens Moderne de l'Europe*, and Holtzendorff, *Handbuch*, secs 3-4.

<sup>2</sup> During the late war the prime minister of Great Britain, Mr. Asquith, in addresses pronounced on September 4, September 18, and November 9, 1914 referred to the "public law of Europe," and so did the King in his speech from the throne on September 18. See the quotations from these addresses in Alvarez, *La Grande Guerre Européenne*, pp. 54-56.

<sup>3</sup> See his *Le Droit International Américain* (1910) especially p. 263; see also his *L'Avenir du Droit International*, p. 14; his *La Codification du Droit International*, pp. 183-208, and his address in the *Proceedings of the American Society of International Law*, 1909, pp. 206 ff.

which are inapplicable to the American continent.<sup>1</sup> On the other hand, there has developed among the states of America, and especially of Latin America, a body of law and practice to meet the somewhat peculiar problems and conditions of the new world. By reason of the revolutionary origin of these states, their greater solidarity of interests, and their geographical remoteness from Europe, it was almost inevitable that there should have developed ideas, traditions and policies different from those of Europe. They constitute in a sense a family of nations by themselves, they have problems which are distinctly American and some of which are *sui generis*, and by means of a succession of pan-American conferences they have sought to agree upon common international policies in respect to many of these problems and to embody in conventions certain principles of international law as among themselves which are inapplicable to or unacceptable in Europe.<sup>2</sup>

M. Alvarez says "the American governments did not accept in the political organization of their respective countries those principles of public law then dominant in Europe which were not suited to the conditions of life in those states." In their foreign relations, "they rejected all the existing principles and practices which were contrary to their independence or did not favor their free and untrammelled growth." Thus in respect to belligerency and insurgency, the right of conquest, intervention, the relation of international to municipal law, the international responsibility

<sup>1</sup> See the enumeration of these problems in his *Le Droit International Américain*, pp. 271 ff.

<sup>2</sup> The first pan-American Scientific Congress (1908) approved a resolution affirming that "the diversity in the development of the new world as compared with the old has had the following effect upon international relations, namely: that on this continent there are problems *sui generis* or of a distinctly American character, and that the states of this hemisphere, by means of agreements more or less general, have regulated matters which are of sole concern to them, or which, if of universal interest, have not yet been susceptible of universal agreement—thus incorporating principles of American origin. This class of questions constitutes what may be termed 'American problems of conditions in international law.'"

of states, the utility of international arbitration, the freedom of the seas, the equality of states, nationality, the principles embodied in the so-called Monroe, Calvo and Drago doctrines, the rules of international law proclaimed in Latin America, especially, vary to such an extent from those recognized or followed generally in Europe that they may be said to constitute "a veritable body of American international law."<sup>1</sup> The thesis that there is or can be a distinct body of "European" or "American" international law has, however, been generally denied by writers outside Latin America and even by some Latin American publicists.<sup>2</sup> But the idea is criticized rather upon considerations of expediency, since the recognition of the existence of a "European" or an "American" international law would tend to undermine the conception of a universal society of states, and give undue weight to particularism in international relations.<sup>3</sup> It is, of course, quite true that the bulk of the rules of international law are suitable for universal application among the whole body of civilized states and they ought to be accepted as such, but there would seem to be no reason why a group of states constituting a continent in themselves and having problems and entertaining conceptions more or less different from those elsewhere, should not agree upon and apply as among themselves

<sup>1</sup> See his *Le Droit International Américain*, especially Ch. VIII and his address in *Procs. Amer. Soc. of Int. Law*, 1909, pp. 210 ff. See also Pradier-Fodéré, *Traité de Droit International Public Européen et Américain*; Seijas, *El Derecho Internacional Hispano-Americano Publico Y Privado*; Urrutia, *El Derecho Internacional Americano*; Moulin, *La Doctrine de Drago*, 14 *Rev. Gén.* pp. 466 ff; Drago, *Les Emprunts d'Etats et leurs Rapports avec la Politique Internationale*, 14 *ibid.*, pp. 271 ff. and 287 ff; Alcorta, *Cours de Droit Int. Public*; and Quesada, *Arbitration in Latin America*.

<sup>2</sup> For example by the Brazilian publicist, Sa Vianna, *de la Non-Existence d'un Droit International Américain*. Senor Vianna appears, however to have recognized the possibility if not the existence of an "American international law," if limited to the regulation of relations exclusively between American states. Quoted by Alvarez in his address cited, p. 219.

<sup>3</sup> Compare Hershey, *Essentials of International Public Law*, p. 1.

rules of international law different from those which are admittedly binding upon them in their relations with other states outside their own circle. In this sense, and only in this sense, can the theory of regional international law be defended.<sup>1</sup>

If we turn to the actual development of international law in recent years we shall see that the forms which it has taken, the lines along which the development has proceeded, and the purposes which it has been sought to accomplish can be roughly grouped under the following heads :

(1) The enlargement of the international community whose members may be regarded, wholly or in part, as the subjects of international law.

(2) The formulation and restatement of the rules of international law and their embodiment textually in the form of conventions.

(3) The reconciliation of differences between states as to what the law in respect to particular matters is, or should be, and the removal of divergences of interpretation.

(4) The adaptation and extension of old rules of law to new and changed conditions of international life.

(5) The formulation of new rules for the regulation of the conduct of relations formerly unregulated or for the regulation of newly established relationships.

(6) The development of agencies and processes for the peaceable settlement of international disputes, to the end that law and justice may be substituted in the place of force and violence in the relations between states.

(7) The creation of a legal organization for the society of states with common legislative, administrative and judicial organs.

<sup>1</sup> The rules of international law which are founded on the principles of justice, reason and humanity are not regional but universal in their application. The United States Supreme Court in 1880 speaking of "the universal law of reason, justice and conscience of which the law of nations is necessarily a part" quoted with approval the saying of Cicero "Nor is it one thing at Rome and another at Athens, one now and another in future, but among all nations it is, and in all times it will be, eternally and immutably the same." *Wilson v. McNamee*, 102 U. S. 572.

As already stated, the system of international law was of European origin and until near the end of the eighteenth century there were no states outside Europe to which its rules applied.<sup>1</sup> The advent of the United States into the family of nations brought under its dominion a state which was destined to exert an important influence on the history and development of international law.<sup>2</sup> Almost at the outset, the government of the United States announced the principle that international law, as a system, is binding upon nations, not merely as something to which they may be tacitly assumed to have agreed, but also as a fundamental condition of their full and equal participation in the intercourse of civilized states<sup>3</sup> and it has always proceeded on the assumption that international law is a part of the municipal law of the country and as such must be ascertained and administered by the courts. The achievement in the early part of the nineteenth century, by the states of Latin America, of their independence also brought into the family of

<sup>1</sup> Kluber in his *Le Droit des Gens Moderne de l'Europe*, published in French in 1818 (pp. 44-46), gives a list of the sovereign states of Europe as they existed at that time.

<sup>2</sup> As to that influence compare Nys, *Les Etats-Unis et le Droit des Gens*, 41 *Rev. de Droit Int. et de Lég. Comparée* (1909), pp. 37 ff.; Alvarez, *La Codification du Droit International*, p. 183; also his *Le Droit International de l'Avenir, Ch. I*; and Westergaard, *Jour. of the Soc. of Comp. Leg.*, 1918, pp. 2, 14.

<sup>3</sup> Moore, *Digest of International Law*, Vol. I, p. 2. The founders of the Republic recognized that the new state which they brought into existence was bound by the law of nations and that it was an integral part of its own municipal law. See the opinions of Jefferson and Hamilton quoted by Moore, *ibid*, I, 10-11 and VII, 675. It may be remarked that the Continental Congress in 1776 appointed a Commission to draw up the "principles of international law" to be followed by the American diplomatic representatives abroad. Compare in this connection Foster, *Century of American Diplomacy*, p. 19. Professor Fenwick in his edition of Vattel (preface XL) says the law of nations was being taught at King's College in New York city in 1773. Scott remarks that international law "passed with the English colonists to America; and that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic." *Cases on International Law* (1922), p. xi.

nations & large number of republics, so that the number of states in the new world came to exceed that of the old. The people of Latin America, it may be remarked, have from the first shown much interest in the science of international law; the study of it is taught in all their law schools and their contributions to the literature of the subject have been considerable and important.<sup>1</sup>

At different times throughout the nineteenth century the society of states was further enlarged by the admission of Asiatic states such as Turkey, Persia, Siam, Japan and China and a few African states. Formerly, there was considerable discussion as to whether the system of international law was applicable to non-Christian states, but the admission of the above-mentioned states to membership in the international community has definitely put the question beyond the realm of controversy.<sup>2</sup>

<sup>1</sup> As to this, see my address before the Second Pan-American Scientific Congress, 1915-1916, *Proceedings*, Vol. VII, pp. 106 ff. Concerning Latin American writers on international law see also an article in 19 *Rev. de Droit Int.*, 227.

<sup>2</sup> Woolsey in his treatise on *International Law* (6th ed., 1899, p. 3) defined international law to be "the aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other and to each other's subjects." See also his remarks, *ibid*, sec. 223, where he assumes that international law is the law for Christian states only. As to the admission of non-Christian states to the international community see 7 *Rev. de Droit Int.*, pp. 659 ff., 11 *ibid*, 227; 17 *ibid*, 536, and 23 *ibid*, pp. 8 ff.; and the *Annuaire de l'Institut de Droit Int.* 1877 and the resolutions adopted by the Institute in 1883, pp. 199 ff. David Dudley Field in his day maintained that international law in "all its plenitude" was applicable to all nations, occidental and oriental, Christian and pagan, in regard to matters of common interest and particularly the preservation of the peace and the exercise of the right of war. See his article in 7 *Rev. de Droit Int.*, p. 616 and Nys, *Le Droit Int.*, Vol. I, p. 123. Fiore also maintained that international law should be applied to every state which enters into relations with other states, without regard to its political constitution or religious faith and to every man whatever his race or color. And he added that, at the present day, no state of Africa, Asia or other part of the world is excluded from the legal community. Except for certain limitations admitted in its application by reason of the historic and moral conditions to whom it is applied, "international law has extended its dominion over all the inhabitants of the world and has acquired its true character as the law of mankind." Fiore, however, admits that the "imperative force of international law"

The creation of the new states of Italy and the German Empire in 1870-71 and the recognition of the independence of Greece, Roumania, Bulgaria, Montenegro and Servia brought additional accessions to the European section of the society of states, and the number has been still further increased by the establishment of a group of new states since the close of the world war. The admission of a number of petty and more or less backward states to participation in the Peace Conference of 1919 and to membership in the League of Nations shows a disposition not to insist upon over-rigorous standards in respect to area or civilization as conditions of membership in the international community. Finally, the extension of the same privileges to India and the self-governing dominions of Australia, Canada, New Zealand, and South Africa—all of which are integral parts of the British Empire—reveal a disposition not to insist on independence as an absolute condition to participation in the organization of the society of states. In brief, recent events indicate a tendency in the direction of enlarging the international community so as to extend its membership to include not only all independent states, large and small, civilized and semi-civilized alike, but also great colonial dominions which have acquired a large measure of autonomy.<sup>1</sup> Further developments may possibly see even individuals recognized as subjects of international law for certain purposes.<sup>2</sup>

should be considered as limited to states which by reason of their civilization have developed the fundamental legal principles indispensable to their admission to the community of law. *International Law Codified*, secs. 44-47. Westlake points out also that some states have been admitted to "international society" and to the enjoyment of certain of the benefits of international law, without having been admitted to the advantages of the whole of it, such as those states which are still under the regime of consular jurisdiction. *Collected Papers*, p. 82.

<sup>1</sup> As to the former somewhat restricted membership of international society see Westlake, *Collected Papers*, pp. 81-82.

<sup>2</sup> Compare Diena, *l'Individu devant l'Autorité Judiciaire, et le Droit Int.*, 16 *Rev. Gén.*, pp. 57 ff. The Hague Convention of 1907 for the creation of an international prize court allowed *individuals* to appeal



The second important form of development which international law has taken, has been the gradual reduction of its rules to writing, that is to say, its rules, which formerly consisted of customs, usages, practices, and the opinions of text writers and the interpretative decisions of judicial tribunals, have more and more been precisely stated and embodied in the texts of international conventions, or in national manuals, ordinances and codes of instructions issued by particular states for the guidance of their armed forces and even their civil functionaries. The last half-century has seen the conclusion and acceptance by the body of states of a large number of important "law making," multi-lateral conventions either laying down new rules of international law or "declaring" existing customary rules.<sup>1</sup> This process has been largely a work of codification, not merely in the narrow sense of reducing existing rules to textual form but in the larger sense of reaching agreements as to what the law is. The results of the Hague and other international conferences have been to provide the world with a considerable body of written law, especially of the so-called law of war. Thus much of what was formerly found in the somewhat vague and uncertain realm of custom and usage has been given the character of greater precision and definiteness. Altogether, the progress achieved in this direction represents probably the most significant advance that has been made in the development of international law as a system during the past half-century. The great international conferences through which this work has, in the main, been accomplished have also served as the most effective agency for reconciling differences between states as to what the law is or should be. Through mutual discussion and through compromise and concession, agreement has been reached on many

from the decision of national courts to the international court. But the statute for the organization of the permanent court of international justice does not allow recourse to the court by private parties. It is a court for states only.

These conventions are discussed below in Lecture XII.

important questions concerning which the divergencies of view were once pronounced and which formerly were the sources of much irritating controversy. Divergencies as to what the law is and as to what it ought to be, however, still exist, and probably always will exist, but it can at least be said that the number has been greatly reduced and it may be safely assumed that further agreement in the future will be arrived at.

The conditions of international life are constantly changing owing to a variety of causes, such as changes of economic conditions and the progress of science, which has introduced new and rapid methods of communication and transportation, broken down the barriers of distance which formerly separated states, intensified the sense of solidarity of interests among all the members of the international society, and provided belligerents with new and ingenious agencies of destruction. The rapidly changing conditions have necessitated the adaptation of the rules of international law formulated under different circumstances to the new conditions under which they had to be applied. This necessity was never more fully demonstrated than during the world war which was fought in large part with instrumentalities and under conditions differing widely from those known in any former war. So far as the employment of newly invented weapons was concerned it is believed that the old rules were applicable and needed only to be extended by interpretation to forbid inhumane acts committed by any and all weapons whether old or new. There was therefore no need to change the law so as to condemn specifically the use of such instruments, otherwise the law would have to be altered every time a new invention is made. The German argument that the old rules were inapplicable to the use of instruments not in existence and not foreseen at the time the rules were formulated cannot be admitted as valid, otherwise the standards of humanity once fixed would be constantly upset by new inventions and ultimately entirely broken down.

But it is not the same with changes of economic and political conditions in the international life of the world. Such

changes may render the old rules inapplicable because they have become obsolete, arbitrary, illogical or inadequate, and they must be altered to bring them into harmony with the new conditions or be replaced by entirely new rules. Thus the development of international law during the last half-century has consisted, in considerable part, of the adaptation of old rules to new conditions and of the formulation of new rules defining and regulating relations not dealt with by existing rules. It may be remarked in this connection that the lack of appropriate organs for changing the existing rules of international law and for enacting new rules as they are needed has been one of the most serious defects in the system of international relations, and the creation of the League of Nations has not supplied the need. It was once believed that the Hague Conferences would develop into an international legislative or quasi-legislative assembly, meeting perhaps automatically at regular intervals, but there are now no indications that this will be the case.

Nevertheless, in spite of the lack of established organs much has been accomplished, as I have stated, through the work of congresses and conferences called together from time to time to agree upon new rules or to "declare" existing usage and practice in respect to specific matters (such as the Geneva Conferences) or in respect to the conduct of war in general (such as the conferences at the Hague). A very considerable body of law has also been formulated and accepted, as I have already mentioned, through the more direct processes of diplomacy by the conclusion of a large number of important law making conventions dealing with a great variety of special matters.<sup>1</sup>

I have already pointed out in connection with the discussion of the different schools of international law some of the existing divergencies of view in respect either to the content of the law or its mode of ascertainment. There are, in addition, a large number of matters which are not now regulated at all by

<sup>1</sup> This matter is more fully discussed in Lecture No. XII.

international law, or which are only partially regulated. Thus the whole matter of the rights of states over the air space above themselves and over other states is yet undetermined. The International Air Convention of 1919 deals with the matter to some extent, but by its express terms it has no application in time of war, and even in its present form it has been ratified only by a small number of states. A host of questions regarding the rights of belligerents and of neutrals over the air space were raised during the world war and there was little or no law either conventional or customary dealing with them and there is none now.<sup>1</sup> A large part of maritime war law has always been in a more or less chaotic condition,<sup>2</sup> and the events of the world war left it more so than ever. Had the Declaration of London been ratified we should have had a fairly complete if not satisfactory code of law on the subjects with which it dealt, but the failure of the powers to accept it has left the law still uncertain and the task of settling it remains yet to be undertaken.

In consequence of the controversies raised during the world war over the use of certain newly invented instrumentalities for the carrying on of war, particularly, the submarine torpedo boat, the automatic submarine mine, toxic gases, and the air ship, there is urgent need of agreement upon the conditions and limitations under which such agencies of destruction may be employed.

There are many other "unsettled" questions which ought to be regulated. Among those which have been suggested are : the definition of the grounds upon which intervention is justifiable ; various questions of extradition, particularly the definition of political offences and the matter of the extradition of nationals ;

<sup>1</sup> See below Lecture II ; also my *International Law and the World War*, Vol. I, Ch. 19.

<sup>2</sup> See for further details on this subject Lecture No. III. As to the conflicting views concerning the law of maritime war see Vallotton, *De Quelques Conflits de Coutumes de la Guerre Maritime*, 46, *Rev. de Droit Int. et de Leg. Comp.*, pp. 287 ff.

the adoption of a test for determining enemy character ; a more precise statement of the rights and immunities of consuls ; definition of so-called " international crimes " and provision for more effective measures for dealing with them ; more definite rules regarding the so-called right of asylum in legations, consulates and on ships ; the status of submarine cables in time of war ; the legal status of the territorial sea ; legislation defining the so-called " open door " policy ; rules for the suppression of espionage in time of peace ; the punishment of offenders against the laws of war ; more precise formulations of the doctrine of equality of states and of the nature of national sovereignty ; conditions under which new states and *de facto* governments may properly be recognized ; the rights of insurgents ; rules for the exchange of prisoners of war or their release on parole ; and many others.<sup>1</sup>

There is also considerable sentiment in favor of extending the domain of international law over new fields so as to bring under its dominion many matters which are now dealt with wholly or mainly by municipal legislation. The matter of nationality, for example, has acquired in recent years an international importance which was formerly unknown and one of the results of the world war was to reveal in a striking manner the inconveniences and almost " scandalous " conditions resulting from different and conflicting systems of municipal legislation on the subject.<sup>2</sup> It would be a great gain if in the place of these conflicting national laws we could have a uniform law in

<sup>1</sup> Compare the list of subjects " not now regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted," submitted by sub-committee No. 4 of the American Society of International Law at its meeting in 1921, *Proceedings*, pp. 122-123. See also the list of questions proposed by a commission of the Institute of International Law in 1912 for special study in view of the contemplated third Hague Conference, *Annuaire de l'Institut*, Vol. 25, pp. 31-32.

<sup>2</sup> As to these conditions see a learned article by Professor Valéry entitled *Des Influences Probables de la Guerre Mondiale sur l'Avenir du Droit Int. Privé*, in *Revue de Droit Int. Privé*, 1917, pp. 1 ff.

the form of an international convention, prescribing the conditions under which nationality may be acquired and under which it shall be lost. This would remove the sources of international controversy which arise with increasing frequency in respect to dual nationality and the *heimatlos* status.<sup>1</sup>

There might also be a similar convention dealing with the status of foreigners, the civil rights and status of whom is now regulated entirely by municipal law, with the result that there is the same divergence of legislation and practice that exists in the case of nationality. The matter has become of increasing importance in recent years because of the large emigration of peoples from one state to another. Diplomatic controversies have greatly multiplied in consequence of disputes between states regarding their rights and there would be a distinct advantage if an agreement could be reached as to the treatment to which they shall be entitled in the states in which they are resident. The severe treatment to which enemy, aliens were subjected by many states during the world war raises also the question whether their rights and the treatment to which they may properly be subjected upon the outbreak of war should not be fixed by international agreement instead of leaving the whole matter to regulation of municipal law to be exercised by each state according to its own standards of justice. With the outbreak of war passions are so inflamed that it is often difficult for governments when left fully to their own discretion to deal justly and humanely with this unfortunate class, and it would be in the interest of justice and humanity if their rights could be defined in time of peace and set forth in the text of an international convention. There has also been some agitation for an international convention regulating the whole matter of immigration<sup>2</sup> but

<sup>1</sup> As to the need of such a convention see an illuminating article by Dr. Bles entitled *Un Droit Uniforme sur la Nationalité* in 48 *Rev. de Droit Int.* (1921), pp. 513 ff. See also Hicks, *The New World Order*, pp. 249 ff.

<sup>2</sup> See on this point an article by M. Olivi, entitled *L' Emigration au Point de Vue Juridique International*, in 30 *Rev. de Droit Int.*, pp. 421 ff.

there is much less need for such an agreement, and in any case, there is little probability that states will ever consent to surrender their control over a matter of such vital interest to them and which it must be admitted is more largely a question of domestic than of international concern.

More weighty is the argument for a uniform international law regulating the extradition of fugitives from justice.<sup>1</sup> At present the whole matter is regulated by bi-partite treaties and there is much diversity of opinion and practice in regard to extraditable offences, the obligation of states to surrender their nationals, the conception of political offences, the evidence necessary to authorize extradition, and the like. An effort to remove this diversity among the states of America, by means of a general treaty was made by the Second Pan-American Conference of 1902 which agreed upon the draft of such a treaty, but it has never been ratified. There has been a remarkable increase in recent years of crimes for the punishment of which the processes of extradition are necessary and in the general interest of social protection the surrender of fugitives from justice should be facilitated by every possible means. That the replacement of the multifarious bi-lateral extradition treaties, with their diversity of rules, by a single convention based on considerations of international security rather than upon local conceptions or legal theories, would conduce to the more effectual accomplishment of this end, there would seem to be little reason for doubt.

In this connection it has been further proposed to extend the sphere of international law so as to bring under its dominion a larger part of the field of the criminal law.<sup>2</sup> As is well known,

<sup>1</sup> Compare Hicks, *op. cit.*, pp. 235-236.

<sup>2</sup> See especially the recent treatises of M. Travers, *Le Droit Pénal International et sa Mise en Œuvre en Temps de Paix et en Temps de Guerre*, three Volumes (Paris, 1920-1922), and of M. Donnedieu de Valères, *Essai d'Histoire et de Critique sur la Compétence Criminale dans ses Rapports avec l'Etranger* (Paris, 1922). See also Gorraud, *Traité de Droit Pénal Français*, Vol. I, sec. 167; Von Bar, *Lehrbuch*

the criminal law is now almost wholly municipal and is in most countries based on the territorial theory of jurisdiction. Each state punishes infractions of its laws when committed within its own territory whenever the offenders can be apprehended. If they escape into the territory of another state they are not punished by the latter state unless they happen to be its own nationals, and then only when such state applies the personal theory of jurisdiction. If, as is the case with the United States and Great Britain, the territorial theory of jurisdiction prevails, the offender, is not delivered up through the processes of extradition, he goes unpunished. At present there are only a few offences which have been made crimes under international law. They are piracy<sup>1</sup> and perhaps the slave trade, the so-called white slave traffic, the liquor traffic in the North Sea, the traffic in arms and munitions in certain regions of Africa, and the circulation of obscene publications. Aside from the conventions dealing with these acts there is no international criminal legislation and there is not as yet any international criminal court or international machinery for the repression of crime.<sup>2</sup> The rapid increase of "international criminality" in recent years resulting from the invention of new instrumentalities for the commission of crime and the increased facilities by which offenders may escape from the state in which

*des Internationalen Privat und Strafrechts* (1892); Rohland, *Das International Strafrecht*; Meili, *Lehrbuch des Internationalen Strafrechts* (1910) and Despagnet de Boeck, *Précis de Droit Int. Privé*, 5th ed., sec. 18.

<sup>1</sup> By the treaty signed at Washington on February 6, 1922, the five signatory powers denounced the employment of submarines for the destruction of merchant vessels as a crime analogous to piracy and agreed that all persons charged with such acts should be brought to trial and punishment "as if for an act of piracy."

<sup>2</sup> As to the present status of "international criminal law," see, in addition to the treatises mentioned above, an article by Mr. G. G. Alexander entitled "International Criminal Law" in the *Four. of the Soc. of Comp. Leg. and Int. Law*, for Oct., 1921, pp. 237 ff.; Reeves, "International Criminal Jurisdiction" in *Procs. Amer. Soc. of Int. Law*, 1921, pp. 621 ff.; and Armijon, in 48 *Rev. de Droit. Int.* (1921), pp. 181 ff.



their crimes have been committed have given rise to a demand in many quarters for international legislation and the organization of an international system of repression to meet the situation.<sup>1</sup> Those who favor this movement point out that under present conditions the repression of crime is no longer the concern of particular states; on the contrary, it has become a matter of general interest to the international community, and the problem should be attacked through international co-operation and action, so as to ensure a more effective enforcement of the criminal law throughout the whole world. M. Travers, who has occupied himself with the study of the whole problem, proposes that instead of the present chaotic, somewhat sporadic, system by which each state administers its own criminal law within its own territory, the administration of the criminal law outside its own boundaries should be undertaken by a group of states, not, however, through the agency of a common tribunal, but by each state within the group in which a criminal is arrested. He does not go to the length of proposing that states should be deprived of the administration of their own internal law, but he suggests the creation by each state of a bureau of information and other central agencies of assistance for the international repression of crime. As is well known, the advisory committee of jurists which drafted the statute of the Permanent Court of International Justice recommended that an international high court of criminal justice be created to try crimes against international law, but the recommendation was not adopted by the Council and Assembly of the League of Nations nor was the Permanent Court vested with any jurisdiction in criminal matters.<sup>2</sup> Until

<sup>1</sup> Compare Donnedieu, *op. cit.*, p. 1; Pillet, *Principes de Droit Int.* (1903), p. 385, and Larnaude et Lapradelle, in *Jour. du Droit Int. Privé*, (1919), p. 155.

<sup>2</sup> M. Loubat, a well known French jurist and procurator-general of Lyons, in an article published in the *Temps* of October 31, 1920 (reproduced in 47 *Clunet* 905 ff.), advocated a system of penal sanctions for the laws of war and the vesting of the Permanent Court of International Justice with jurisdiction of such cases.

there is an agreement as to what are crimes against international law, in short, until a system of penal sanctions has been adopted, the establishment of an international criminal court would not however meet the situation. The Peace Conference Commission on responsibility for the war, recommended the establishment of a system of penal sanctions for grave outrages against the elementary principles of international law but the Conference took no action on the recommendation.

Regarding the proposals looking toward the internationalization, in part, of the criminal law and its enforcement, it must be admitted that they are in line with an undoubted modern tendency which seeks to bring within the sphere of international regulation and administration, interests which have become international in their range and effect. Under the conditions which prevail to-day this tendency is inevitable, and it represents an effort to find the solution of a problem which is becoming more and more serious. But in view of the prevailing conceptions regarding the equality of states and of their absolute sovereignty it is not likely that states, for a long time at least, will consent to an abandonment of their own control over the enactment and administration of their criminal law. It is not improbable, however, that ultimately there will develop a considerable body of uniform international criminal law and that common measures for the repression of crime will be adopted ; but it will come slowly and gradually with the growth of a stronger sense of interdependence and solidarity. Proposals for the further enlargement of the domain of international law have been made from time to time. Some writers indeed have almost gone to the length of advocating international regulation of practically every relation or activity which has an international interest, such for example, as international commerce, transit and communication, colonial administration, international public utilities, monopolies, production and distribution of the principal raw materials, rights of foreign creditors, bankruptcy, public

health, labor, finance, marriage and divorce, etc.<sup>1</sup> If this conception of the domain of international law should find general acceptance and be carried out in practice, a large part of the law of the world would become international and municipal law would tend more and more to disappear. Such a complete transformation is not likely to take place; nevertheless, the conditions of modern international life justify the belief that the tendency of the future will be in this direction and it may be safely assumed that many matters now regulated by municipal law will ultimately be transferred to the field of international law, so that the existing proportions between the two domains will be widely different from what they are at present. Already, in fact, as I shall point out in a subsequent lecture,<sup>2</sup> considerable progress has been made through the agency of a series of conferences at the Hague on private international law toward agreement on uniform rules concerning the application of foreign law relative to such matters as inheritance, bankruptcy, guardianship, marriage and divorce, civil procedure, bills of exchange, promissory notes, etc. There is also a considerable body of international conventional law relating to sanitation, public health and labor. It may therefore be said that there is in process of development a body of international labor law, international health law, international financial law, international aerial law, international commercial law, and international criminal law.<sup>3</sup> It may also be remarked that the creation of a large number of international administrative

<sup>1</sup> Compare Brown, *International Realities*, p. 148; Fiore, 16 *Rev. Gén.*, 463 ff.; Reinsch, *Procs. Amer. Soc. of Int. Law*, 1921, pp. 90-91; and Alvarez, *La Grande Guerre Européenne*, Ch. 3; also his *La Codification du Droit Int.*, Ch. 6; his *Le Droit Int. de l'Avenir*, pp. 122-127, and his article, *Le Nouveau Droit des Gens*, in 47 *Rev. de Droit Int.* (1920), pp. 149 ff.

<sup>2</sup> Lecture XIV, on Codification.

<sup>3</sup> Compare Alvarez, *Le Nouveau Droit des Gens*, 47 *Rev. de Droit Int.* (1920), p. 151.

unions with their bureaus, offices, commissions and other organs has given rise to the development of a body of international administrative law.<sup>1</sup> It is not improbable that ultimately a definite body of international law relative to various other matters such as interstate railway, and tunnels, submarine cables, wireless telegraphy, etc., will come into existence, if indeed it is not already in the process of making.<sup>2</sup>

There remain to be mentioned two other forms which the recent development of international law has taken. The first is the development of machinery and processes for the judicial or quasi-judicial settlement of international disputes. This movement reached its highwater mark in the establishment of the so-called permanent court of arbitration at the Hague, the achievements and defects of which I shall consider in a subsequent lecture.<sup>3</sup> Much effort has also been directed toward the perfection of other agencies for the peaceable settlement of controversies between states, such as the employment of good

<sup>1</sup> Compare Reinsch, "International Administrative Law and National Sovereignty," 3 *Amer. Jour. of Int. Law*, pp. 1 ff.; also his *Public International Unions*, Ch. 5; Neumeyer, *Internationales Verwaltungsrecht*, 1910; also his article, *Le Droit Administratif International*, in 18 *Rev. Gen. de Droit Int. Pub.*, pp. 492 ff.; Gessner, *Le Droit Administratif International*, 18 *Rev. de Droit Int.*, pp. 329 ff.; Alvarez, *Le Codification du Droit International*, p. 236; Catellani, *Le Droit International au Commencement du XXe Siècle*, 8 *Rev. Gen.*, p. 396; Kazansky, *Théorie de l'Administration Internationale*, 8 *Rev. Gen.*, pp. 356 ff.; and Stein, in 6 *Jahrbuch für Gesetzgebung*, pp. 395 ff.

<sup>2</sup> Compare Stein, *Le Droit International Des Chemins de Fer en cas de Guerre*, 17 *Rev. de Droit Int.*, 343 ff.; Robin, *Le Tunnel sous la Manche*, 15 *Rev. Gen.*, pp. 50 ff.; Moynier, *ibid.*, Vol. 20, 365 ff.; Buzzati, *ibid.* 388 ff.; and Nowacki, *Die Eisenbahnen im Kriege* (1906); Rey, *Reseau Telegraphique Sous-Marin en Temps de Guerre*, 8 *Rev. Gen.*, pp. 681 ff., and the bibliography on p. 683, N. 1; Fischer, *Die Telegraphie und das Völkerrecht*, 1876; Lorentz, *Les Cables Sous-Marins et la Telegraphie sans Fil* (1906); Scholz, *Krieg und See Kabel*, 1904; Higgins, "Submarine Cables and Int. Law," in *Br. Yr. Book of Int. Law*, 1921-22, pp. 27 ff.; Root, "Status of International Cables in Peace and War," *Procs. Amer. Soc. of Int. Law*, 1921, pp. 70 ff.; and Phillipson, *Two Studies in International Law* (1908), pp. 55 ff.

<sup>3</sup> Lecture No. XIII.

offices, mediation, international commissions of inquiry, etc.<sup>1</sup> The essential purpose of all this effort has been to substitute a system of law and justice in the place of force and violence as the basis of conduct between states. It has resulted only in partial success and there remains much still to be accomplished before the goal is reached.

Finally, the most important and the most necessary movement has been the effort to endow the society of states with a legal organization<sup>2</sup> based on the assumption by each state of obligations and responsibilities in the interest of the maintenance of the general peace. Its object has been to transform the unorganized semi-anarchic "family of nations" into a legally organized union of states with a constitution and common organs, legislative, executive and judicial. This age-long dream has now been partially realized by the creation of the League of Nations, the members of which have agreed to certain limitations on their freedom of action and to undertake certain obligations with a view to promoting and ensuring the maintenance of the peace of the world. They have established certain common organs and offices, the most important of which is a permanent court of international justice which is now organized and ready to discharge the duties assigned to it. The organization of the League of Nations undoubtedly represents the highest point yet attained in the long process of international evolution and if it achieves any considerable measure of success it will mean much for the future of international law, the promotion of which is one of its declared objects. Unfortunately the organization of the League is defective in many respects and in its present form it can hardly be admitted to represent the final and ultimate organization of international society.<sup>3</sup>

<sup>1</sup> Discussed in Lecture No. XI.

<sup>2</sup> See Lecture XII on "The Development of International Organization and Legislation," and Lecture XIII on "The Development of International Arbitral and Judicial Courts."

Such, in brief are the principal lines along which international law has developed, especially during the last half century—the forms which it has taken, and the probable lines of development which it will follow in the future. Its defects and weaknesses as a system of law are recognised by all. There are still lacking appropriate organs for formulating new rules and altering existing rules, and while we now have an international judicial court, its competence is so restricted that its service in the development of international jurisprudence is not likely to be important.

The chief defect in the system of international law, in its present state, lies of course in its purely voluntary character. It remains still, as its name indicates, *inter-national* and not *super-national* or *supra-national* law. Its subjects are not individuals but independent sovereign states, which in the last analysis are the judges of their own controversies, free to set their own standards of conduct, and bound to observe the law only in so far as they choose to do so. As yet, it lacks effective sanctions by which conformity to its prescriptions can be compelled, at least by legal processes. Sir Henry Maine remarked that "the founders of international law, though they did not create a sanction, created a law-abiding sentiment."<sup>1</sup> Mr. Root goes even further and adds that "the difference between municipal and international law, in respect of the existence of forces compelling obedience, is more apparent than real, and that there are sanctions for the enforcement of international law, no less real and substantial than those which secure obedience to municipal law." Those sanctions are found in the impulse of conformity to the standards set by civilized society and the unwillingness of states to incur the general obloquy and condemnation which follow repudiation of those standards.<sup>2</sup> In ordinary times of peace, the

<sup>1</sup> *International Law*, p. 51.

<sup>2</sup> See his address on "The Sanction of International Law" in *Procs. Amer. Soc. of Int. Law*, 1908, pp. 14 ff. "The rules of international law,"

"law-abiding sentiment," a "decent respect for the opinions of mankind" and the disinclination of states to incur the disapprobation of international public opinion have proved to be fairly effective forces in deterring them from violating the law, but during the stress and strain of war they have not always been sufficient. There are other means by which states have sometimes been able to restrain one another from violating the law and of compelling them to respect the rights which it creates. Such are threats of reprisal and retaliation, non-intercourse, commercial and financial boycotts, embargoes, pacific blockades, severance of diplomatic relations, displays of force and the like.<sup>1</sup> But after all, these are the primitive alternatives of self-help and not legal remedies. The greatest of all the tasks of the future, so far as the strengthening and perfection of international law is concerned, is to devise means for making it effective in the sense in which municipal law is effective, that is, of establishing appropriate sanctions and providing machinery for compelling respect for its prescriptions. The task is a difficult one but it is not impossible. It must come through international organization, and co-operation on the part of the whole society of states.<sup>2</sup> The machinery and processes created by the League of Nations represent, it is believed, an important step along the path that must ultimately be travelled before this necessary end is achieved

he declares, "are enforced by the same kind of sanction, less certain and peremptory, but continually increasing in effectiveness of control." Compare also Smith, "Nature and Future of International Law," 12 *Amer. Pol. Sci. Review*, p. 3.

<sup>1</sup> As to these measures see More, *Digest of International Law*, Vol. VII, secs. 1089-1099; Borchard, *Diplomatic Protection to Citizens Abroad*, pp. 445-454; Laferrière, *Le Boycott et le Droit International*, 17 *Rev. Gen.*, pp. 288 ff.; Dumas, *Les Sanctions de l'Arbitrage International* (1905); also his article in 15 *Rev. Gen.*, pp. 557 ff.; Kebedgy, in 29 *Rev. de Droit Int.*, pp. 118 ff.; Duplessix, *L'Organisation Internationale* (1909), pp. 76 ff. See also Roxburgh, "The Sanction of International Law," 14 *Amer. Jour.*, pp. 26 ff., and Baldwin, 52 *Amer. Law Review*, 695, who advocates the suspension from the society of nations of states which violate the established rules of international law.

<sup>2</sup> Compare Alvarez, *Le Droit Int. de l'Avenir*, p. 121.

—but it is only a step. Nevertheless the existence of defects in the system of international law in its present state does not deprive it of its character as law; they only impair in some degree, its effectiveness and usefulness.<sup>1</sup> In the present stage of its development its status is somewhat like that of national law in its infancy or adolescence,<sup>2</sup> and Professor Westlake has observed that it is now not less certain and better obeyed than was the law of England during the early stages of its development.<sup>3</sup> An eminent American jurist even goes to the length of asserting that it is "on the whole as well obeyed to-day as municipal law" and he adds: "Perhaps one would not go too far in saying that it is better observed, at any rate in time of peace."<sup>4</sup>

As to the future of international law it would be hazardous to speculate. But that the system will ever be destroyed or abolished there is no reason to believe.<sup>5</sup> On the contrary, that its development will continue in proportion as civilization progresses and the sense of solidarity among nations becomes

<sup>1</sup> Sir Henry Berkeley in the case of the *S. S. Prometheus*; (Supreme Court of Hong Kong, 2 Hong Kong Law Reports, 1906, pp. 207, 225) advertent to the contention that international law has no real existence because it lacks sanctions and means of compelling obedience to its prescriptions, justly remarked that law might be established between nations by agreement although it might be impossible to enforce obedience to it. The resistance of a nation to a law which it has accepted and agreed to observe, he said, did not derogate from the authority of the law, simply because that resistance, perhaps, could not be overcome, any more than the resistance of an individual or group of individuals to a rule of municipal law destroyed the existence of the latter. Such resistance merely puts the resisting nation in the position of being a breaker of the law to which it has given its adherence, but it does not affect the existence of the law.

<sup>2</sup> Compare Munroe Smith, "Nature and Future of International Law," 12 *Amer. Pol. Sci. Review*, p. 4.

<sup>3</sup> *Collected Papers on International Law*, p. 9.

<sup>4</sup> J. B. Moore, "Law and Organization," 9 *Amer. Pol. Sci. Review*, p. 11. Mr. Moore adds: "If one would only reflect upon the smallness of the number of international claims that arise in times of internal peace, he would not be disposed to question the correctness of this statement." Compare also to the same effect Higgins, *The Binding Force of International Law*, p. 8.

<sup>5</sup> But compare the following remarks of Mr. C. A. McCurdy, K.C., M.P., in *V. Grotius Society Transactions* (1919), p. 121: "If we are



stronger, may be confidently assumed.<sup>1</sup> Its dominion will be gradually extended, organs for formulating, altering its rules and adapting them to new and changed conditions will ultimately be created, an international court with a larger competence to interpret and apply its rules will be established, effective sanctions will be devised for enforcing conformity to its commands, and in other ways the whole system will be strengthened and perfected. The crisis through which it has lately passed is only a temporary incident, from the effects of which it will quickly recover; indeed if the late war should have any effect upon its future it will be rather to strengthen than to diminish the effort to improve and perfect it.<sup>2</sup> The substitution of democratic government in the place of autocracy throughout the world will remove one of the chief forces which has caused nations in the past to "break over and destroy the limitations of the law," the universalization of democracy therefore will facilitate the growth of respect for law and justice among the states of the world.<sup>3</sup> Both science and statesmanship must collaborate in the task of rebuilding and strengthening the fabric of international law. Statesmanship must free itself from the narrowness and selfishness of nationalism and become more and more international in its policy and outlook. The science of international law must likewise free itself from national bias and from the tyranny of phrases, and become more genuinely positive and more impartial in its teaching.<sup>4</sup>

ever to found a new order of international relations in which wars will become impossible, the first step, as it appears to me, is not to maintain the authority of what is known as international law, but to abolish the whole code as incompatible with the object for which a League of Nations is desired." But apparently he has reference only to the law of neutrality.

<sup>1</sup> Compare Fiore, *Int. Law Codified*, sec. 51.

<sup>2</sup> Compare Root, "The Outlook for International Law," *Procs. Amer. Soc. of Int. Law*, 1915, p. 4.

<sup>3</sup> Such is the thesis of Mr. Root. See his address on "The Effect of Democracy on International Law": in *Procs. Amer. Society of Int. Law*, 1915, pp. 2 ff.

<sup>4</sup> As to the task of the science of international law in the development of the law, compare Oppenheim, *The Future of International Law*, Ch. IV, and Fiore, *International Law Codified*, secs. 54-55.

## LECTURE II

### Development of Conventional International Law ; the Hague Conventions.\*

The development of conventional international law reached its highwater mark in the contributions of the two so-called peace conferences held at the Hague in 1899 and 1907. Until then, international law was, as the late Professor Oppenheim once remarked, "essentially book law"<sup>1</sup>; that is, it was found, for the most part, in the treatises of text writers. This is not saying that text writers made the law, for they certainly did not; it is only saying that their books were the most available repositories of information as to what the rules of law were which states generally applied and which therefore were regarded as "established" and binding. Nor is it saying that the law was stagnant before 1899-1907; on the contrary, it was going through a process of development quite as real and important as that through which it went during the latter period. In fact, the contributions of the Hague Conferences consisted less in the addition of new rules to the existing body of law than of the restatement, more precise formulation and "conventionalization" of the rules of customary law and practice already recognized as established. In other words, the rules formulated by the Hague Conferences were, in a large measure, merely declaratory of the existing customary law and practice. Their work was therefore more largely that of codification than of legislation in the strict sense of the word. There had of course been some

<sup>1</sup> *The Future of International Law*, p. 56.

sporadic and partially successful efforts at international legislation and codification before 1899. The Vienna Congress of 1815, the first great European international assembly of the nineteenth century, had formulated certain rules regarding such matters as the navigation of international rivers, the suppression of the slave trade, and the fixing of the rank and precedence of diplomatic representatives, but, in the main, it was concerned with the settlement of political and territorial questions growing out of the long war which had preceded it. It was not therefore primarily a "law-making" assembly in the sense that the Hague Conferences were. The Congress of Paris of 1856, following the close of the Crimean War, was of the same character. Like the Congress of Vienna, however, it assumed the rôle of an international legislature to a limited degree and formulated four brief, though important, rules dealing with the subjects of privateering, blockade and the immunity from capture of private property on neutral ships and of non-contraband neutral property under an enemy flag.<sup>1</sup> Signed by seven states, the Declaration was in time acceded to by nearly all the maritime states of the world. The rules regarding blockade and the immunity of neutral goods under an enemy flag were in the main merely declaratory of the general opinion and practice. But the rules abolishing privateering and exempting enemy goods under a neutral flag from capture constituted new law, in the sense that they had not been formerly regarded as obligatory, except where made so by express treaty stipulation. This was recognized in the preamble which referred to the "deplorable disputes" regarding maritime law in time of war, the "uncertainty of the law," and the advantage of establishing "a uniform doctrine." In 1864 a Conference at Geneva formulated a convention for the "amelioration of the condition of the wounded in war," and certain additional articles extending the principles of the convention of 1864 to naval warfare were agreed upon by a similar

<sup>1</sup> Text and Comment in Higgins, *The Hague Peace Conferences*, I-4.

conference at Geneva in 1868, though the latter were not ratified. The historical importance of the Geneva convention of 1864 consisted in the fact that it represented the first attempt to formulate, through the agency of a general conference, a body of rules relative to the conduct of war on land. A third conference at Geneva in 1906 revised and improved the Convention of 1864.<sup>1</sup> It was signed by 35 states and several others subsequently acceded to it. In the meantime other contributions were being made or attempted by international conferences which were assembled from time to time. In 1868 a Conference at St. Petersburg representing 18 European states, called upon the initiative of the Russian government, adopted a Declaration by which the contracting powers agreed to renounce, in case of war between any of them, the use of "any projectile of less weight than 400 grammes (about 14 ounces) which is explosive or charged with fulminating or inflammable substances." The importance of this Declaration in the history of the development of international law consists in the fact that it was the first formal international act restricting the use by belligerents of the instruments which they may employ to injure the enemy. The statement in the preamble that there are "technical limits at which the necessities of war ought to yield to the requirements of humanity," is a sound and generally recognized principle and it was incorporated, by references, in the regulations respecting the laws and customs of war on land (art. 23) adopted by both the Hague Conferences.<sup>2</sup> The London Conference of 1871, attended by representatives of the powers signatory to the treaty of Paris of 1856, and summoned to deal with the situation caused by

<sup>1</sup> *Ibid*, pp. 9-38. The convention of 1864 consisted of 10 articles; the revised convention of 1906 consisted of 33 articles. Some of the latter are new, others are revisions of the corresponding articles of the earlier convention and in various articles a new nomenclature is employed. See an article by Gen. Geo. B. Davis entitled the "Geneva Convention of 1906" in *1 Amer. Jour.*, pp. 400 sqq., and an article by Prof. T. E. Holland on "The New Geneva Convention," *Fortnightly Review*, August, 1907. See also Holland's *The Laws of War on Land*, Sec. VI.

<sup>2</sup> Text and Comment in Higgins, *op. cit.*, pp. 5-7.

Russia's violation of a provision of the latter treaty in respect to the Black Sea, formally proclaimed an important principle of international law, which, though it had not been expressly incorporated in any international convention, was at the time certainly regarded as one of the well established understandings of the law of nations. The rule thus proclaimed was that no power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable agreement.<sup>1</sup>

The first attempt to codify the rules of international law governing generally the conduct of warfare on land was made by the Brussels Conference of 1874, at which fifteen European States were represented. The Conference met in time of peace and was not therefore concerned with the settlement of issues growing out of a war. It was called by the Czar of Russia solely for the purpose of discussing and reaching an agreement upon the rules which should be observed by belligerents in the conduct of land warfare. Like the Geneva Conference of 1864 it was therefore purely a law-making assembly, but it differed from the latter conference in that the scope of its program was not limited to a single aspect of land warfare. It formulated the draft of a Declaration concerning the laws and customs of war, in fifty-six

<sup>1</sup> Some writers hold that in the absolute form in which the principle is stated above, its soundness cannot be admitted. Compare Hershey, *Essentials*, p. 75, and Lawrence, *Principles* (4th ed.), p. 328. Lawrence maintains that if the principle were invariably followed it would prevent the normal and legitimate development of states. It should be remembered, however, that all treaty obligations are subject to the rule of *rebus sic stantibus* and consequently any party has a right to demand a release from its engagements whenever the original conditions under which they were entered into have undergone such fundamental changes that the continuance of the obligations would result in hardship or retard the development of the state. The nature of the *rebus sic stantibus* reservation is examined in my *International Law and the World War*, Vol. II, p. 218. When Austria Hungary violated the treaty of Berlin by annexing Bosnia and Herzegovina in 1908 she requested and obtained the assent of the other parties, which was given through diplomatic communications rather than through the agency of an international conference called for the purpose.

articles, but for reasons which are explained in another chapter of this work it was never ratified by any of the powers represented at the Conference. As a whole, the act remained therefore without binding effect, but it may be remarked that most of its rules were merely declaratory of existing custom and practice and as such were binding independently of the validity of the Declaration as a whole. It may also be remarked that the Draft became the basis of the regulations concerning the laws and customs of war on land adopted by the first Hague Conference. Its influence, therefore, in the development of international law was by no means inconsiderable.<sup>1</sup> Other "law-making" conferences were held from time to time during the ensuing years, each of which contributed something toward giving the law of nations greater certainty and precision and in some instances of laying down new rules.<sup>2</sup> It was characteristic of most of these Conferences that they were held at the close of wars and their chief concern was the settlement of the terms of peace and of other issues growing out of such wars. They were not therefore, primarily, law-making assemblies and, if in addition to their primary functions they undertook to formulate

<sup>1</sup> The text may be found in Higgins, *op. cit.*, pp. 273, 280. The work of the Brussels Conference is fully examined by Bordwell in his *Law of War*, Ch. X.

<sup>2</sup> Thus the Convention of Constantinople of 1888, signed by nine European powers, for the neutralization of the Suez Canal may justly be regarded as an important act of international legislation. In the same class may be placed the Convention framed by the West African Conference of 1884-85 providing among other things for freedom of trade, and travel within the Congo basin, and the suppression of the slave trade, and laying down rules regarding the occupation by European powers of African territory and the obligation to maintain order therein. Text in Supp. to 3 *Amer. Jour.* (1909), pp. 7-25. It was followed by an act (100 articles) of the Brussels Conference of 1890 (at which 17 states were represented) for the "repression of the African slave trade and the restriction of the importation into, and sale in a certain defined zone of the African Continent, of fire arms, ammunition and spirituous liquors." Text, *ibid.*, pp. 29-59. Both acts were abrogated by the Peace Conference of 1919 and replaced by two new conventions signed by the allied and associated powers at St. Germain on September 19.

certain rules of international law, that was rather incidental to their main purpose. In some cases also the powers participating in these conferences were limited to those which had been belligerents in the wars preceding them, and the plenipotentiaries who represented the participating states were usually diplomats rather than jurists or technical experts. In these respects, however, the Conferences of 1864, 1868, and 1874 were exceptions. They were not called to settle political questions growing out of war, but met in time of peace for the purpose of discussing and framing rules of international law.

We come now to the most important of all the Conferences which have been assembled for the purpose of making international law, namely those which met at the Hague in 1899 and 1907. The circumstances under which the Conference of 1899 was called are well known to students of international law, and it is unnecessary, as it is impossible for lack of space, to detail them here. It is sufficient to recall that the initiative came from the Czar of Russia, whose country like others was at the time staggering under the constantly increasing weight of military and naval armaments which threatened to involve the governments of Europe in financial bankruptcy and ruin. By a rescript of August 23, 1898, addressed to the various diplomatic representatives accredited to the Russian government, the Czar dwelt upon the financial burden which was oppressing the world as a result of the maintenance of excessive armaments and the diversion of the intellectual and physical strength of nations from productive and industrial pursuits. He therefore proposed a Conference of all the powers having diplomatic representatives at the Russian court to take into consideration the possibility of arresting this ruinous and ever-increasing drain upon the resources of the world, not merely for the economic saving which it would result in, but also in the interest of the maintenance of the general peace.<sup>1</sup> The proposal was favorably received by the

<sup>1</sup> Text of the Rescript in Holls, *The Peace Conference at the Hague*, pp. 8-10; see also a volume published by the Carnegie Endowment for

powers to which it was addressed and the humanitarian motives of the youthful Czar from which it emanated made a deep impression and was everywhere the object of generous tribute. The acceptance of some of the powers like the United States was prompt and whole-hearted but others accepted tardily and with an evident skepticism as to the practicability<sup>1</sup> of any scheme for disarmament or even substantial reduction of armaments. Apparently impressed with this evidence of skepticism and convinced that a proposal limited principally to disarmament was certain to encounter strong opposition, the Czar on January 11, 1899 issued a second rescript in which the program of the proposed Conference was enlarged to include not merely a discussion of limitation of armaments but also a discussion of possible methods "of preventing armed conflicts by the pacific means at the disposal of international diplomacy," and the placing of restrictions upon the employment of certain agencies and instrumentalities of warfare. The enlarged program thus proposed embraced discussion of a possible understanding not to increase for a fixed period existing military and naval armaments, as well as the budgets for their maintenance ; to prohibit the use of new firearms, explosives and powders ; to prohibit in future wars the employment of submarine torpedo boats or plungers or similar engines of destruction, and an agreement not to construct in the future, vessels with arms ; to restrict the use of existing formidable explosives and to prohibit the throwing of projectiles or explosives of any kind from balloons or by any similar means ; to apply to naval warfare the stipulations of the Geneva Convention of 1864, on the basis of the additional articles of 1868 ; to neutralize ships and boats

International Peace, entitled *Instruction to the American Delegates to the Hague Peace Conferences and their Official Reports*, pp. 1-0.

<sup>1</sup> The Secretary of State John Hay in his instructions to the American delegates declared that "the proposed Conference promises to offer an opportunity thus far unequalled in the history of the world for initiating a series of negotiations that may lead to important practical results."



employed in rescuing those overboard during or after an engagement ; to revise and adopt the unratified Brussels Act of 1874 concerning the laws and customs of war ; and to accept in principle the employment of good offices of mediation and of facultative arbitration as a means of preventing armed conflicts. The rescript added that it was well understood that all questions concerning the political relations of states and the order of things established by treaties, and in general all questions which did not directly fall within the program adopted by the cabinets, must be absolutely excluded from the deliberations of the Conference.<sup>1</sup> In this form the Czar's call was more favorably received and the Hague having been agreed upon as the place of meeting, the formal invitation of the government of the Netherlands was sent out on April 7, 1899. The Conference was formally opened on May 18, one hundred plenipotentiaries representing twenty-six powers being present. It was the first assembly in the history of the world in which so large a number of the nations had participated ; it was not, to be sure, a gathering of all the nations ; though it was the nearest approximation to it that had ever occurred. Herein consists the chief historical significance of the Conference in the progress of international relations. The invitations extended had, with a few exceptions, been limited to the powers which maintained diplomatic relations with Russia. Exceptions were made, however, in the case of Luxembourg, Montenegro and Siam. On the other hand, the South African Republic and the Orange Free State, although represented at the Russian Court, were not invited.<sup>2</sup> For the first time, all the countries of Europe were represented in an international conference ; four Asiatic powers (Japan, China, Persia and Siam) were also represented. No African state, however, was represented although there were six states in that continent which claimed to be sovereign. Of the twenty-one

<sup>1</sup> Text of the rescript in Holls, *op. cit.*, pp. 24-27.

<sup>2</sup> Hull, *The Two Hague Conferences*, p. 10.

American republics, only two, the United States and Mexico, were represented, although two others are said to have received invitations.<sup>1</sup> Each power sent from one to eight plenipotentiaries but the rule of equality prevailed, each state, large and small alike, being allowed one vote on all questions which were put to a vote. M. Leon Bourgeois, head of the French delegation, in the course of a speech on the arbitration convention, said "When swords are thrown in the balance, one side may easily outweigh the other. But in the weighing of rights and duties, disparity ceases and the rights of the smallest and weakest powers count as much in the scales as those of the mightiest."<sup>2</sup> This followed as a necessary corollary to the principle of the sovereignty and equality of states, though manifestly it gave the preponderance of weight to the small states and at the second conference it proved to be an insurmountable obstacle to the organization of the proposed court of arbitral justice.<sup>3</sup>

<sup>1</sup> The failure to invite the Pope was the subject of criticism in some quarters. The Queen of the Netherlands, who extended the formal invitations, addressed a letter to the Pope on May 7, 1899, informing him of the approaching conference and requesting his moral support of the work to be undertaken. His Holiness hastened to reply and to express his keen sympathy, as well as to offer both his moral support and active co-operation. The correspondence between the Queen and the Pope is printed in Holls, pp. 338-340. Some writers think a mistake was made in not inviting the Pope because his participation in the Conference would have added much to its moral influence. See Chrétien, *La Papauté et la Conf. de la Paix*, 6 *Rev. Gén.*, p. 281; and Olivart, *La Conf. de la Haye et ses Resultats*, *ibid*, p. 858.

<sup>2</sup> Quoted by Holls, p. 274. A delegate from Argentina said at the second Conference: "We may affirm henceforth that the political equality of states has ceased to be a fiction and that it abides, established as an obvious reality." *La Deuxième Conférence de la Paix*, Vol. I, p. 593.

<sup>3</sup> For a discussion of the principle of equality at The Hague Conferences see Dickinson, *The Equality of States*, pp. 180-184. In theory, the conference adopted the rule requiring a unanimous vote to pass resolutions but at the outset the principle was strictly observed. At the first Conference the principle of unanimity was preserved only for the more important conventions. When therefore unanimity could not be obtained on an important proposal it was dropped. At the second Conference, however, the rule of unanimity lost some of its sanctity and it was agreed that resolutions upon which there was "quasi-unanimity"

The majority of the plenipotentiaries were diplomats, statesmen and publicists, but there was a considerable number of military and naval men, as well as some legal, technical and scientific experts. The deliberations of the Conference were characterized perhaps by less of the spirit of compromise, of concession, and of give and take, than marked the proceedings of the International Naval Conference at London in 1908-09, but withal there was an earnest and sincere effort on the part of the Conference to reach agreements and to accomplish results.

should be regarded as resolutions of the Conference though it was not precisely determined what constituted "quasi-unanimity." When thirty-two states against nine had voted for obligatory arbitration in certain cases, Martens, Choate and others proposed that the resolution be made binding upon the thirty-two states voting in the affirmative, but the minority opposed this attempt and it failed, the first German delegate denouncing it as an assault upon the Conference and one which would endanger future conferences. A somewhat similar proposal was made by the British delegation when its proposition for the abolition of contraband had received the affirmative vote of twenty-six states against five. But only Haiti was willing to allow it. Professor Zorn, one of the German delegates, defended the rule of absolute unanimity; majority resolutions, he said, would destroy the principle of the sovereignty of states, which was the basis of international law. But the rule of unanimity meant a return of the old Polish *liberum veto* and it put into the hands of a single state the power to prevent action. In reality, the principle of equality of states does not require the observance of the rule of unanimity. It is not likely that the larger states will consent to the rule of a bare majority, but it would seem that a rule based on the principle of a three-fourths majority might be accepted, and this proposal has been made by Oppenheim and others.

Certainly the rule of equality of states coupled with unanimity of voting in international conferences constitutes the most serious obstacle in the way of the development of international law and international organization. The former, so far as it relates to participation in international conferences, is a fetish resting upon no principle of justice or equity, while the latter is a relic of a past age. Westlake characterized the method of voting in the Hague Conferences as a "sham" and suggested that in future conferences "all voting had better be avoided". *Collected Papers*, pp. 536-7. The doctrine of equality of states is attacked by Lawrence in his *Essays on some Disputed Questions in Modern International Law* (Ch. V). The part which the doctrine played at the Hague Conferences is fully discussed in Schücking, *International Union of the Hague Conferences*, pp. 209-236 (Eng. trans. from the German by Fenwick); by Hicks, in *2 American Journal*, pp. 530 ff.; and by Dickinson in his book on *The Equality of States*, pp. 180-184.

It is not possible within the limits of this chapter to discuss in detail the proceedings of the Hague Conferences, to analyze the proposals and counter-proposals submitted, to review the arguments for and against them or even to evaluate, with any degree of fullness, the results achieved. It must suffice merely to summarize the actual contributions which they made to the development of international law and to point out the principal achievements and failures.

Concerning the proposal for a limitation of armaments, which appears to have been the sole object which the Czar had in mind at the time his first rescript was issued, and which occupied the chief place on the program as finally agreed upon, we are forced to say that nothing whatever was accomplished. The proposal for a reduction of armaments was presented and ably advocated by the Russian delegate, Colonel Gilinsky, and it was eloquently supported by General Den Beer Poortugael and Jonkheer Van Karnebeek of the Netherlands, by M. Léon Bourgeois of France, and others, but it was vigorously attacked by General von Schwarzhoff of Germany who assured the Conference that his country was not crushed under the weight of military burdens, but that on the contrary, it was making great economic progress, public and private wealth was increasing, and the German people were not complaining at the charges which their armaments entailed, nor at compulsory military service, which they regarded as a sacred and patriotic duty. He also denied that excessive armaments were provocative of war. Aside from objections founded on public policy, there were difficulties of a technical and practical character which made an agreement impossible. Some delegates who favored the general principle of limitation of armaments found the Russian proposals unacceptable because of their form. No agreement therefore could be reached and the sole achievement of the Conference, so far as it related to armaments, was the expression of an opinion in the final act that "the restriction of military charges, which are at present a

heavy burden on the world is extremely desirable for the increase of the material and moral welfare of mankind." The *voeu* was also expressed that the governments, taking into consideration the proposals made at the Conference, might examine the possibility of an agreement as to the limitation of armed forces by land and sea and of war budgets. These "pious wishes," we are told, were voted unanimously; but it does not appear that any government took up seriously the examination referred to. As Lémonon observes, these platonic resolutions were no solution of the question; on the contrary, they were proof of the impossibility of an agreement.<sup>1</sup> The moment was not yet ripe and so the "mad craze" for armaments went on unabated. A like result awaited the Russian proposals regarding the employment of new firearms, explosives, powders, submarine torpedo boats, warships armed with rams and other engines of destruction.<sup>2</sup>

The only record of achievement in this connection was the expression of a "wish" in the final act that the questions regarding rifles and naval guns might be studied by the governments with the object of coming to an agreement respecting the employment of new types and calibers. No such study, however, appears to have ever been undertaken by any government and this wish of the Conference like the others remained without effect. During the course of the discussion on the above mentioned proposals a Swiss delegate brought up the matter of the use of bullets which aggravate wounds and produce useless suffering. After considerable discussion concerning the formula in which the interdiction should be phrased the Conference agreed upon and adopted a declaration to prohibit "the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the

<sup>1</sup> *La Seconde Conférence de la Paix*, p. 3.

<sup>2</sup> See the report of the American delegation to the Secretary of State where the decisions on each proposal are detailed. See also Hull, *The Two Hague Conferences*, pp. 169-177.

envelope does not entirely cover the core, or is pierced with incisions."<sup>1</sup>

The proposal on the Russian program for the prohibition of the discharge of projectiles or explosives from balloons or similar means, encountered little opposition and the prohibition agreed upon constitutes one of the three declarations in the final act of the Conference. It was based entirely upon humanitarian considerations because balloons in the existing state of their development could not be employed with accuracy for the purpose of discharging projectiles. In view, however, of their possible perfection through inventive genius it was decided to limit the duration of the prohibition to five years, thereby preserving the freedom of action of the parties in the event of changed conditions resulting from the progress of invention.<sup>2</sup> A third prohibition was also agreed upon after considerable discussion, namely, that which forbids without limitation, as to duration, the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases. This like the other prohibitions was adopted in the interest of humanity although the qualification which resulted from the employment of the word "sole" diminished somewhat its value and effectiveness.<sup>3</sup>

The Russian proposal that the stipulations of the Geneva Convention of 1864 be adopted and extended to naval warfare,

<sup>1</sup> The British, American and Portuguese delegations, however, voted against it. Hull, *op. cit.*, p. 187. Bordwell, *op. cit.*, pp. 128-132; and Holls, p. 103. See also Captain Crozier's Report to the American Delegation.

<sup>2</sup> Captain Crozier's Report to the American Delegation. Neither Great Britain nor the United States ratified this Declaration.

<sup>3</sup> The United States delegation voted against this Declaration, the reason given being that no shell emitting such gases was in practical use; that the reproach of cruelty against these "supposed shells" had been formerly made against other weapons now employed without scruple; and that it was illogical to be tender about asphyxiating men with gas when it was admittedly allowable to torpedo boats at sea and drown those on board. Finally, it was said that when a shell emitting asphyxiating gases had been successfully produced, it would be time to consider the question of its prohibition. See Captain Mahan's Report to the American Delegation. Great Britain and Portugal also refused to ratify the Declaration.

as the additional but unratified articles of 1868 had attempted, encountered no opposition and one of the three conventions adopted by the Conference accomplished this object. The effect was to secure to hospital ships, as well as the sick and wounded aboard them and the personnel in charge of them, similar immunities to those enjoyed under the Convention of 1864 by hospitals, ambulances, the wounded and medical staffs in land warfare. The immunity thus accorded to hospital ships of belligerent nationality was also extended to hospital ships fitted out by individuals and officially recognized societies of neutral countries, when officially commissioned and properly notified by their governments. Belligerents were, however, allowed to visit and control them and even to detain or order them off.<sup>1</sup>

A question not on the program but which the American delegates were instructed to propose was the exemption of private property (contraband excepted) from capture in maritime warfare. The American government almost from the beginning had advocated this reform in the law of maritime warfare and whenever possible it had concluded treaties in which the immunity was recognised. The delegations of the other powers, however, insisted that the action of the Conference should be strictly limited to the matters specified on the program, otherwise the door would be opened to a great variety of proposals emanating from many sources and might lead to endless discussion and the possible postponement of the objects which those who had summoned it and those who were

<sup>1</sup> Captain Mahan opposed the recognition thus accorded to hospital ships under neutral flags, on the ground that it was unprecedented and that no necessity for it existed. For this reason he recommended that the American government refuse its adhesion to articles 3 and 6 which deal with the employment of neutral vessels engaged in succoring or transporting the sick, wounded or shipwrecked. The American delegation, mainly for this reason, declined to sign the Convention. See Admiral Mahan's Report to the American Delegation on the work of the second committee.

participating in it had directly in view. Under these circumstances the American delegation refrained from pressing the matter and contended themselves with addressing to the President of the Conference a memorial in which the historic policy of the United States was reviewed and the principal reasons in favor of the proposed reform were presented. The communication was referred to the appropriate committee, which reported that it did not consider itself competent to discuss the subject. The Committee, however, reported a resolution expressing the wish of the Conference that the question might be referred to a subsequent conference for consideration, and this was unanimously adopted.<sup>1</sup> Two other matters which were similarly disposed of, were the question of rights and duties of neutrals and the bombardment by naval forces of ports, towns and villages. There remained on the program two other important questions, namely, the proposed revision of the Brussels Act of 1874 respecting the laws and customs of war on land and the employment of good offices, mediation and arbitration for the settlement of international disputes. In dealing with these matters the Conference achieved its principal success.

The Convention respecting the laws and customs of war on land in sixty articles represented in the main an attempt to codify the existing customary rules of land warfare, with such additions and modifications as seemed desirable. The Convention defined in some detail the qualifications which armed forces must possess in order to be entitled to recognition as lawful belligerents; the duties and obligations of belligerents in respect to the treatment of prisoners of war were set forth in sixteen articles; then followed a series of articles imposing certain restrictions upon the means which a belligerent may lawfully

<sup>1</sup> For the text of the American memorial and the speech of Mr. Andrew D. White in support of the views therein set forth see Holls, *The Peace Conference at the Hague*, pp. 306-21. See also the Report of the American Delegation.



employ to injure his enemy and enumerating certain instrumentalities and methods which were prohibited; the law of military occupation of enemy territory was set forth in fourteen articles; and other articles dealt with spies, flags of truce, capitulations, etc. The Convention was largely a revision and amplification of the unratified Brussels Act of 1874 which in turn was an improved edition of Lieber's Instructions for the government of the United States armies in the field. The Convention made what was regarded as an extreme concession to states which rely mainly upon militia and volunteer forces as means of defense against invasion, by recognizing as legitimate combatants such forces under certain conditions. The provisions regarding the rights of prisoners and their treatment were in accord with the humanitarian sentiment and enlightened opinion of the time. The dominating principle of the Declaration of St. Petersburg was incorporated in Article 22, which affirmed that "the right of belligerents to adopt means for injuring the enemy is not unlimited." The bombardment of undefended towns and places was forbidden, and so were various other acts which the humanitarian sentiment of the civilized world condemned.

The whole spirit and purpose of the Convention were indicated in the preamble where it was declared that the Conference was animated by the desire to serve the interests of humanity and the ever-increasing requirements of civilization by diminishing the evils of war, so far as military necessity permitted. With this end in view the Conference had undertaken to revise the laws and general customs of war by defining them more precisely and laying down certain limits for the purpose of modifying their severity, as far as possible. Naturally, it was not possible to cover the whole field and to reach an agreement upon all matters likely to arise in practice. This the Conference frankly recognized and formally made it a matter of record. In order, however, to remove all foundation for a possible claim that the matters left unregulated might be determined by military commanders without reference to the law, the Conference

took the precaution to insert in the preamble to the Convention a statement to the effect that it was not the intention of the contracting parties that the cases not covered by the express rules of the Convention should be left to the arbitrary judgment of military commanders. It was further added that, until a more complete code of the laws of war was issued, "the high contracting parties think it right to declare that in cases not included in the regulations annexed to the Convention, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." An important provision was that embodied in Article I which imposed upon the contracting parties an obligation to issue "instructions" to their armed forces which should be in conformity with the regulations annexed to the Convention—an obligation which, it may be added, was not complied with by many of the governments which ratified the Convention. Constituting as it did the first general code of war law, its formulation and acceptance by the greater part of the civilized world may justly be regarded as one of the important landmarks in the history of the development of conventional international law. Professor Zorn thought it alone would have entitled the Conference to be considered as a success, and Professor Martens of Russia regarded it as one of the two notable achievements of the Conference.<sup>1</sup>

The Convention for the pacific settlement of international disputes is generally regarded as the crowning work of the first Conference and the one which has probably produced the most beneficial results of any of its acts. It was clear from the outset, as it is to-day, that the pathway to peace lies not through an effort to induce states to surrender their means of defence or even to reduce their armaments in any considerable degree, but rather

through agreement to settle their differences by judicial or similar peaceable methods. The American government appears to have been so thoroughly convinced of this elemental truth that it instructed its delegates to concentrate their efforts upon the adoption of a plan for the promotion of international justice, and this they did with zeal and ability. The Convention adopted and sanctioned the principle and provided rules and machinery for recourse to different methods for the peaceable settlement of differences. One such means consisted of an agreement to resort, before appealing to arms and so far as "circumstances permit," to the good offices or mediation of one or more friendly powers, in case of serious disagreement or conflict. Unfortunately, however, the hope entertained has proved an illusion, for little or no attempt has in fact been made by the powers to adjust their disputes through recourse to this procedure, and the instances in which third parties have offered to act as mediators have been almost equally rare, although occasions for it have been abundant.

A newer and less frequently used means of adjusting differences of fact not involving the honor or the vital interests of the parties which the Conference recommended, was recourse to international commissions of inquiry. The function of such a commission as defined by the Convention consists in "elucidating the facts by means of an impartial and conscientious investigation" and in making a report of its findings to the parties in dispute. In order to leave no misapprehension as to the nature of the findings, the Convention expressly declared that the report was in no way to be regarded as an arbitral award but that the parties should be left with entire freedom of action.

A third and more important amicable means of settling international differences with which the Convention dealt in great detail was international arbitration. There was nothing novel or unprecedented in this mode of procedure as it had been successfully employed in hundreds of cases, and its value as a

peaceable means of settling disputes had been fully demonstrated. The seal of approval by the Hague Conference was not necessary to commend it to the world, but it was important that an obligation to resort to it be assumed by the powers and that the necessary machinery and procedure be provided. Unfortunately the proposals which were made looking to obligatory arbitration of certain disputes were defeated, mainly on account of the opposition of Germany, and, as finally adopted, the Convention left the parties free to arbitrate or to refuse to arbitrate their disputes as they might choose. The utmost to which the Conference was willing to go on this point was to record its desire in the preamble that the "empire of law" might be extended and the "appreciation of international justice" strengthened. This pious wish was supplemented by a declaration (Article 16) that in questions of a legal nature, and especially in the interpretation or application of international Conventions, arbitration was "recognized" as the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to solve. This resolution, of course, created no obligation to arbitrate any dispute. The only really important achievement of the Conference in the interest of arbitration was the creation of a so-called permanent court at the Hague and the formulation of a body of rules for its procedure. This was probably the most significant single accomplishment of the first Hague Conference. Although described in the Convention as a "court" it was in fact only a panel of judges from which a court could be created by the parties whenever they had occasion to resort to it. For this and other reasons, it fell far short of the plan of a really permanent court such as the American government instructed its delegates to press for.

Such in brief were the achievements and failures of the first Hague Conference. Unfortunately the failures were more numerous than its substantial accomplishments, and considerable disappointment as well as criticism followed its adjournment.

But, as M. Lémonon remarks, to be just, it must be recognized that all the criticism was not well-founded.<sup>1</sup> It is true that the work of the Conference was not effective in preventing the outbreak of all future wars, but the successful settlement of several important controversies by the permanent court of arbitration and by recourse, on several occasions, to an international commission of inquiry may possibly have averted others.

Furthermore, the rules formulated by the Conference for the regulation of the conduct of hostilities may have served an important purpose in restraining belligerents and in diminishing the horrors of the wars which the convention for the pacific settlement of disputes was unable to prevent. Secretary of State John Hay characterized the Conference of 1899 as "an epoch in the history of nations" and as one which accomplished a "great good."<sup>2</sup> Mr. Elihu Root, Secretary of State of the United States in 1907, remarked that the most valuable result of the Conference of 1899 was that it made the work of the Conference of 1907 possible.<sup>3</sup> Various matters on the program of the first Conference were either not taken up for consideration or no agreement on them could be reached, and they were left over as unfinished business for a second conference, the calling of which the first conference itself recommended. Notwithstanding a certain disappointment at the failures of the first conference there was a wide-spread feeling that its work ought not to be judged solely on the basis of its specific accomplishments but rather upon the basis of the progress which it represented in the initial process of international co-operation. The work which it had begun ought, therefore, to be carried forward by a series of conferences to completion; to abandon all further effort would have the effect of discrediting the value of

<sup>1</sup> *La Seconde Conférence de la Paix*, p. 8.

<sup>2</sup> Letter of October 21, 1904 to the American diplomatic representatives accredited to the governments signatory to the acts of the first Hague Conference.

<sup>3</sup> *Addresses on International Subjects*, p. 129.

international conference and of leaving unfinished a great undertaking already begun.

The initiative for the summoning of the second Conference was taken up by the Interparliamentary Union at its annual meeting at St. Louis in 1904, which adopted a resolution requesting the President of the United States to invite all nations to send representatives to such a Conference. President Roosevelt deeply sympathized with the suggestion and promptly took steps looking toward the calling of the Conference. Upon his instructions, Secretary of State Hay, on October 21, 1904, addressed a letter to the American diplomatic representatives accredited to the governments which had taken part in the Conference of 1899, requesting them to inquire whether those governments were disposed to send delegates to a second Conference to continue the work begun by the first one. Favorable replies were received from all the governments addressed, although the Russian government stated that in view of the existing war between itself and Japan it would not be practicable for it to take part in a conference at that time. Further steps were therefore postponed until the termination of the war, when the Russian government signified its willingness to participate in the conference (memorandum of September 13, 1905). It being intimated to the President by a Russian representative that it would be agreeable to the Czar if the initiative in calling the second conference could be transferred to him, President Roosevelt gracefully yielded, and upon the Czar's invitation it was formally convoked by the Queen of the Netherlands and assembled at the Hague on June 15, 1907.

The second Conference was a much larger and more representative body than that of 1899. Upon the insistence of the United States, invitations were addressed to all the Latin-American States, none of which except Mexico were represented at the first conference, and in fact delegates from all except Costa Rica and Honduras were seated. In all, 44 of the 57

States of the world claiming to be sovereign were represented, as against 26 in the first conference, and the States represented included all the important powers. It was, therefore, the nearest approximation to a "parliament of man" that the world had yet seen. The Conference was composed of 356 plenipotentiaries as against 100 in the first Conference, among them being many eminent statesmen, jurists and scholars, a considerable number of whom had sat in the first Conference.

- The work of the second Conference consisted, first in revising and improving the conventions of 1899; and second in formulating and adopting new conventions dealing with matters not regulated by the conventions of 1899. The total output of the second Conference was vastly larger than that of 1899, as it was also, on the whole, superior in its quality and value. While the achievements of the first Conference consisted of only three conventions and six declarations, those of the second included thirteen conventions, ten of which were entirely new. Tested, therefore, by the quantity and quality of its output it may be said that the Conference fully justified its existence, in a larger measure, than did the first one.

The limitations of space here permit only a brief summary of the results, achieved.<sup>1</sup> Regarding the subject of limitation of armaments nothing whatever was accomplished. In view of the failure of the first Conference to reach an agreement on the subject, that question was entirely omitted from the program of the second Conference and several delegations made a determined effort to prevent its being discussed, but both the British and American governments had reserved the right to introduce it. Mr. Root instructed the American delegates to regard it as unfinished business. The Conference decided to allow the subject to be introduced and a resolution looking to limitation

<sup>1</sup> More detailed studies of the Second Conference may be found in the works of Choate, Hull, Higgins and Lémonon already referred to. See also a number of valuable articles dealing with particular Conventions in Vol. II of the *American Journal of International Law*.

of armaments was supported in an address by the first British delegate and in a letter by the American delegation, but the arguments fell upon deaf ears. The only recorded result was the adoption of a resolution reaffirming the wish of the first Conference that the question might be seriously examined by the various governments. The Convention of 1899 for the pacific settlement of international disputes was revised, improved and enlarged; whereas the Convention of 1899 embraced only sixty-one articles, that of 1907 contained ninety-seven. The provisions regarding international commissions of inquiry which embraced only six articles in the Convention of 1899 were extended to twenty-eight articles in the Convention of 1907. The commission of inquiry as provided for by the first Conference was left unchanged but the phraseology of the Convention was revised and clarified in the light of the experience in the Dogger Bank case, an optional code of procedure was framed so as to relieve the parties from what might prove a difficult task when their passions were inflamed, provision was made for associating with the commissioners "strangers to the controversy," and recourse to this mode of settling controversies was declared to be "desirable," whereas the Convention of 1899 merely affirmed that it was "useful." The portion of the Convention of 1899 dealing with arbitration was left substantially unchanged except for the addition of several articles providing for a system of summary procedure (articles 86-90), the need of which had become evident from practical experience in several cases that had been referred to the Hague tribunal since 1899. A serious effort was made to reach an agreement upon a general treaty by which the parties should obligate themselves to have recourse to arbitration for the settlement of certain classes of differences, but mainly on account of the opposition of the German delegation, which, although it professed to favor the principle of obligatory arbitration on the basis of special treaties, was unwilling to enter into a general treaty for the purpose. The American delegation ably defended the proposal and it actually received the support



of thirty-five delegations against nine in the committee, but the unanimity rule prevented its adoption.<sup>1</sup> The utmost upon which a unanimous agreement could be reached was a *vœu* accepting in the abstract the "principle of obligatory arbitration" and declaring that certain differences were "susceptible of being submitted to obligatory arbitration without restriction." In short, the powers were willing to affirm the general principle, but they were unwilling to obligate themselves to apply it in concrete cases. The friends of arbitration were deeply disappointed at this virtual "shelving" of the matter, and the American delegation, regarding it as a surrender of the advanced position obtained by an affirmative vote of four to one, abstained from voting on the Declaration.<sup>2</sup>

Still another effort was made to advance the cause of arbitration through the perfection of its machinery and processes, but it too resulted in failure. The so-called permanent court of arbitration created by the first Conference had been successfully resorted to in several cases, but its defects were obvious. Proposals were accordingly made by various delegations for the creation of a really permanent court composed of salaried judges, paid by all the powers in common, and representing the principal legal systems and languages of the world. The advantages of such a court over the old Hague tribunal so impressed the Conference that an agreement was easily reached and a Convention was adopted for the creation of a court of this character, to be known as a "Court of Arbitral Justice," which was not however to supersede the old Hague tribunal, but to be in addition to it. But unfortunately no agreement could be reached as to the number of judges who were to constitute the Court or as to their mode of appointment, because of the insistence on the

<sup>1</sup> A detailed discussion on the subject of obligatory arbitration at both Conferences and the results achieved may be found in an article by Mr. J. B. Scott in *2 Amer. Jour.* (1908), p. 731.

<sup>2</sup> See the Report of the American Delegation to the Secretary of State.

part of the small powers of equality of representation on the Court. In these circumstances the Conference recommended the ratification of the new Convention and the establishment of the Court as soon as an agreement could be reached among the powers upon a mode of selecting the judges. No such agreement was ever reached and in consequence the Court never came into existence.<sup>1</sup>

Two other conventions which were mainly revisions of the corresponding Conventions of 1899 were those concerning the laws and customs of war on land and the adaptation of the principles of the Geneva Convention to maritime war. The code of land warfare of 1899 was modified in certain of its parts and various additions were made with a view to rendering it more complete, accurate and scientific. The rules of 1899 relative to *levées en masse* were altered so as to accord the status of legitimacy to the inhabitants of non-occupied territory who "carry arms openly and respect the laws and customs of war"—this for the benefit of small powers which did not maintain large standing armies but which relied largely upon the patriotism of the people in repelling invasion. Certain changes were also made in the rules relative to the treatment of prisoners. To the category of prohibited means of injuring the enemy were added two others: one forbidding a belligerent to declare extinguished, suspended or non-receivable in a court of law the rights and actions of the nationals of the enemy (the exact force of which has been a subject of controversy),<sup>2</sup> and the other, forbidding a belligerent from compelling the nationals of the enemy to take part in operations of war directed against their own country. Article 25 of the Convention of 1899 forbidding the bombardment of undefended towns, villages, etc., by the ordinary methods formerly employed, was altered by the addition of the words "by any

<sup>1</sup> See on the whole subject an article entitled "The Proposed Court of Arbitral Justice" by J. B. Scott in 2 *Amer. Jour.*, p. 772.

<sup>2</sup> See my *International Law and the World War*, Vol. I, pp. 119-124, for a discussion of the subject.

means whatsoever," so as to prohibit bombardment by air-craft. An important addition was embodied in article 3 which undertook to emphasize the responsibility of the state for the acts of its armed forces committed in violation of the Convention. Curiously enough, it was added at the suggestion of the delegates of Germany against which power it was invoked at the close of the World War. The article declared that the "belligerent party who violates the provisions of the said regulations shall be held to an indemnity if the case demands. It shall be responsible for all acts committed by persons forming part of its armed forces."<sup>1</sup> A revision of the 1899 Convention for the adaptation of the principles of the Geneva Convention to maritime war was made necessary by the fact that the original Geneva Convention of 1864 had been replaced by a new Convention in 1906, and it was the adaptation and extension of this latter Convention to maritime war which was made by the second Hague Conference. It was the purpose of the Hague Convention of 1907 to introduce such changes and ameliorations into the Convention of 1899 as were considered necessary to bring it into conformity with the requirements of the Geneva Convention of 1906. What the American delegation regarded as a part of the deferred work of the first Conference was the matter of the exemption of private property from capture in maritime warfare, and such it was, for the first Conference, as has already been pointed out, had expressed a formal "wish" that the question might be referred to a subsequent Conference for consideration. The American delegation to the second Conference was instructed to press the matter, and it was brought before the Conference by Mr. Choate, who advocated it in an able address. After a discussion lasting through several weeks the American proposal was brought to a vote and twenty-one of the forty-four states represented at the

<sup>1</sup> As to the importance and meaning of this provision see my work cited above, Vol. II, pp. 469-470.

<sup>2</sup> Hull, *op. cit.*, p. 76.

Conference cast their votes in favor of it and only eleven against it. As some of the large powers were opposed to it, the American delegation, which had instructions not to press any matter to the point of irritation, refrained from bringing it before the plenary session of the Conference. It was accordingly dropped, and as Mr. Choate remarked, "there it stands for these twenty-one nations, who supported us, to enter into such an agreement among themselves, or in case of war breaking out between any of them, to make a special agreement for the immunity or for action by the next Conference to be held in 1915."<sup>1</sup>

We now turn to the achievements of the Conference relating to new matters not considered at the first Conference. They were embodied in ten different conventions and one declaration. Taking them up in the order in which they are enumerated in the Final Act of the Conference, we have, first, Convention No. 2 concerning the limitation of the employment of force for the collection of contract debts. As is well known, the practice of European governments, in particular, of resorting to forcible measures to compel Latin-American governments to pay indemnities on account of injuries sustained by their nationals during insurrections and disturbances, and to settle pecuniary claims growing out of contracts, had given rise to much complaint on the part of their governments and publicists. Senor Calvo, a distinguished Argentine jurist, had gone to the limit of condemning intervention, both diplomatic and armed, as a mode of enforcing the collection of all pecuniary claims, private as well as public, and especially those based on contract.<sup>2</sup> At the time, when certain European powers were preparing to coerce Venezuela by means of a pacific blockade (1902) to pay certain claims of their nationals against the

<sup>1</sup> Choate, *The Two Hague Conferences*, p. 77.

<sup>2</sup> See his *Le Droit International*, Vol. I, sec. 205, and Vol. III, secs. 1271 ff.

Venezuelan government, Senor Drago, minister of foreign affairs of Chile, addressed a letter to the Chilean minister at Washington, in which he protested against the use of force for the collection of public debts. He did not, however, go as far as Calvo had done, who, as stated above, protested against the employment of force for the collection of all debts, private and public alike. The principal grounds on which their opposition was based were, that forcible intervention for the purpose of coercing a foreign government was a violation of the sovereignty of the state against which it was directed, that it was generally resorted to only against small and weak powers, and that it tended to encourage unjust and exaggerated claims, as the records of various arbitral commissions abundantly proved.<sup>1</sup>

These arguments found general support in the United States, the government of which had in practice uniformly abstained from resorting to forcible measures for the collection of ordinary contract debts due to its citizens by other governments. Adverting to the established policy of the United States government in this matter, the Secretary of State, in his instructions to the American delegation to the Second Conference, directed them to bring the matter to the attention of the Conference and to press for action upon it. The Secretary of State went on to say that the American government did not consider the use of force for such a purpose as consistent with that respect for the independent sovereignty of other members of the family of nations which is the most important principle of international law and the chief protection of weak nations against the oppression of the strong, and he added that the practice was injurious in its general effect upon the relations of nations and upon the

<sup>1</sup> On the Calvo and Drago doctrines, see Drago "State Loans in their Relation to International Law," 1 *Amer. Jour.*, pp. 692 ff.; Hershey, "The Calvo and Drago Doctrines," 1 *ibid.*, pp. 26 ff.; and Moulin, *La Doctrine de Drago*. Regarding the practice of intervention for the purpose of enforcing the collection of claims against the Latin-American states, see Borchard, *The Diplomatic Protection of Citizens Abroad*, especially pp. 317 ff.

welfare of weak and disordered states whose development ought to be encouraged in the interests of civilization. Moreover, it offered frequent temptation to bullying and to unnecessary and unjustifiable warfare. The proposal was ably defended at the Conference by General Porter, one of the American delegates, who was supported by Senor Drago, delegate from Chile. Although the Conference was almost unanimous in approving the general principle, some delegates opposed the Porter resolution because it went too far, while others disapproved it because it did not go far enough.<sup>1</sup> The Convention, as finally adopted, bound the signatory powers not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals. But it was expressly added that the obligation was not applicable if the debtor state refused or neglected to reply to an offer of arbitration. The Convention thus created an obligation to arbitrate—the only form of obligatory arbitration, it may be remarked, which the Conference could be induced to approve—and in case the debtor state refuses, the claimant state is left free to resort to bombardment, pacific blockade, seizure of customs houses, or any of the other forcible measures, such as have been formerly applied.<sup>2</sup> In short, while the renunciation on the part of creditor state is explicit, the debtor state, in order to receive the full benefit of the renunciation, must in good faith consent to have the claim arbitrated.<sup>3</sup> The creditor state likewise binds itself to submit

<sup>1</sup> Hull, *op. cit.*, p. 358.

<sup>2</sup> Compare Choate, p. 60, who thinks the Convention greatly advanced the cause of arbitration by committing the nations to resort to it before attempting force.

<sup>3</sup> Concerning the Convention in general, see, in addition to the above citations, Scott, G. W., "The Hague Convention respecting the Employment of Force for the Collection of Contract Debts" in 11 *Amer. Jour.*, pp. 78 ff.; Lémonon, *op. cit.*, pp. 97 ff.; Higgins, *op. cit.*, pp. 180 ff.; Barclay, *Problems in International Law and Diplomacy*, pp. 115 ff.; and Westlake, *Collected Papers*, pp. 546 ff.

its claims to arbitration. If the Convention is observed, we shall not likely see again the spectacle of European fleets blockading Latin-American ports, seizing their customs houses and sequestering their revenues for the purpose of enforcing the settlement of contractual claims.

By the third Convention the contracting parties recognised that hostilities between themselves must not commence without previous and explicit warning, either in the form of a reasoned declaration of war or an ultimatum with a conditional declaration of war. They also bound themselves to notify neutrals before beginning hostilities, and it was laid down that a state of war should not take effect as to the latter until after the receipt of a notification, which might, however, be given by telegram or otherwise. These requirements were based on the principle that belligerents should not be taken by surprise, treachery, or bad faith, and that neutrals should not be held responsible for the performance of their duties of neutrality, until they have received due notice of the existence of a state of war. The Conference had no doubt been moved to deal with the matter in consequence of the charge which Russia had made against Japan for having begun hostilities against her in 1904 without a previous declaration.<sup>1</sup> During the discussions of the subject at the Conference some of the delegates proposed to prescribe an interval of time between the declaration and the beginning of hostilities, during which it should be forbidden to make an attack, but it was felt that its only effect would be to give belligerents longer time for preparation and neutrals perhaps an opportunity to violate their neutral duties.<sup>2</sup> It may be doubted whether the value of the Convention, so far as it affects

<sup>1</sup> As to these charges see Hershey, *International Law and Diplomacy of the Russo-Japanese War*, Ch. I; and Lawrence, *War and Neutrality in the East*, Ch. II.

<sup>2</sup> For a discussion of the Convention, see an article by E. C. Stowell in 11 *Amer. Jour.*, pp. 50 ff., and Bordwell, *op. cit.*, pp. 198-200.

belligerents, will be very important, but if observed it will be of distinct benefit to neutrals by fixing the moment when their obligations begin.<sup>1</sup>

The fourth Convention<sup>2</sup> deals with the rights and duties of neutral powers and persons in land warfare, but most of its provisions were merely declaratory of the existing customary usage and practice. It affirms the inviolability of neutral territory as against the infringements of belligerents; it forbids belligerents from committing certain specified acts in violation of the rights of neutrals; it imposes upon neutral powers a corresponding obligation not to permit the performance of such acts within their territory; it defines the status of interned and wounded combatants who have taken refuge in neutral territory and the status of neutral persons resident in belligerent territory; and, finally, it deals with the rights of belligerents over neutral railway material found within their territory, by providing that it may only be requisitioned and used by belligerents in case of imperious necessity and when so requisitioned or used it shall be returned as soon as possible to the country from which it has been taken. The main object of the Convention, as stated in the preamble, was to define more clearly the rights and duties of neutral powers in case of war on land and to regulate the status of belligerent forces who have taken refuge in neutral territory.

Unfortunately, however, the Convention dealt with only a relatively small number of the questions of neutrality likely to arise in an important war and especially those regarding the status of neutral persons and property found in enemy territory at the outbreak of war. The German delegation proposed a

<sup>1</sup> Compare the Report of the American Delegation to the Secretary of State.

<sup>2</sup> The third Convention, which is a revision of the 1899 Convention respecting the laws and customs of war on land, has already been discussed.



series of more detailed rules dealing with the matter, but they were not acceptable to the Conference.<sup>1</sup>

The sixth Convention deals with the status of merchant vessels of belligerent nationality found in the ports of the enemy at the outbreak of war, those which have sailed from their last port of departure before the commencement of war and have entered an enemy port while still ignorant of the outbreak of hostilities, and those which are encountered on the high seas while still in ignorance of the existence of war. The Convention affirmed that it was "desirable" that ships in the first two categories should be allowed to depart freely, either immediately or after a reasonable delay, and as to those in the third class, it was provided that they could not be confiscated, although they might be detained on the understanding that they must be restored after the close of the war, without compensation, or they might be requisitioned or even destroyed on payment of compensation. In fact, there had been no cases since the middle of the nineteenth century in which such vessels had been confiscated, and the American delegation insisted that the practice had grown into an established custom, so that what was in the beginning a favor had become a matter of right. To this view, however, the British delegation, in particular, was opposed, it maintaining that such free entry and departure was merely a favor based on comity and could be granted or withheld at the pleasure of belligerents. Under these circumstances the Conference was unable to agree that the favor formerly accorded had ripened into an obligation, and all that was achieved was merely an affirmation that the concession of free entry and departure was *desirable*. The American delegation, feeling that the Convention in this respect was retrogressive

<sup>1</sup> Concerning this Convention see an article by Senor de Bustamante in 11 *Amer. Jour.*, pp. 95 ff. See also Higgins, *op. cit.*, pp. 182 ff.; Holland, *Laws of War on Land*, pp. 62-68; Lémonon, *op. cit.*, pp. 409-467; Westlake, II, 117 ff. and 284 ff.; and Hershey, *Essentials*, Ch. 30.

rather than progressive, refused to sign it; while Germany refused to ratify the article relating to the exemption of vessels encountered on the high seas proceeding to an enemy port in ignorance of the existence of hostilities. In consequence of this reservation her enemies during the World War refused to accord German merchant vessels the benefit of this exemption but confiscated rather than detained them.<sup>1</sup> The general purpose of the Convention is to protect innocent international commerce against the surprises of war, and if observed by belligerents—and it was generally observed during the late World War—it will go very far toward accomplishing this humane and desirable object.

The seventh Convention deals with the transformation of merchant ships into war vessels after the outbreak of war. The action of the Russian government during its war with Japan in 1904-05 in converting several of its merchant vessels into warships on the high seas (notably the *Peterburg* and the *Smolensk*) had provoked a protest from the British government,<sup>2</sup> and thus the question was brought to the attention of the Conference. A series of rules laying down certain conditions under which such conversions might be legally made, prescribing the external marks which vessels so converted must bear, and dealing with the status of the officers and crews, etc., were formulated. As to the more important question, however, of the place where the transformation might be effected, no agreement could be reached. The American delegation maintained that it might take place either within the home port of the belligerent whose flag the vessel flies or in its territorial waters. The German and some other delegations contended

<sup>1</sup> As to this Convention and former practice see an article by J. B. Scott, in 11 *Amer. Jour.*, pp. 259 ff. See also my *International Law and the World War*, Vol. I, Ch. VI, where the application of the Convention during the World War is discussed.

<sup>2</sup> See Hershey, *International Law and Diplomacy of the Russo-Japanese War*, pp. 151 ff.

that transformation might also take place on the high seas, but to this proposal the British delegation was unalterably opposed. In these circumstances the differences were irreconcilable and the preamble recites that it being impossible to reach an agreement on the matter it was understood that the question of the place where the conversion might take place remained outside the scope of the agreement embodied in the Convention.<sup>1</sup> The practical value of the Convention is not therefore very great. An attempt was made to settle the question at the International Naval Conference at London in 1908-09, but it too resulted in failure. During the World War Germany claimed and exercised the right to convert her merchantmen into war ships on the high seas but Great Britain contested the right and demanded that neutrals should refuse to recognize such vessels as lawful ships of war.<sup>2</sup> The matter therefore remains one of the unsettled questions of international law.

The eighth Convention deals with the laying of automatic submarine contact mines. The employment of these instruments of destruction by Russia during her war with Japan in 1904-05, resulting as it did in the sinking of a considerable number of neutral vessels, particularly those of Chinese nationality, had provoked much criticism and had caused the Russian methods to be denounced as inhumane and contrary to international law.<sup>3</sup> The matter was accordingly brought to the attention of the Second Hague Conference by the Chinese delegation. The Conference easily agreed that certain restrictions upon the employment of mines were highly desirable

<sup>1</sup> The provisions of the Convention being regarded as a corollary of the Declaration of Paris and as a guarantee against a return to a more or less disguised form of privateering, which the American government had never formally renounced, because of the refusal of the other powers to agree to exemption of private property from capture at sea, the American delegation refrained from signing the Convention.

<sup>2</sup> Garner, *International Law and the World War*, Vol. I, p. 385.

<sup>3</sup> See especially Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, p. 93.

that transformation might also take place on the high seas, but to this proposal the British delegation was unalterably opposed. In these circumstances the differences were irreconcilable and the preamble recites that it being impossible to reach an agreement on the matter it was understood that the question of the place where the conversion might take place remained outside the scope of the agreement embodied in the Convention.<sup>1</sup> The practical value of the Convention is not therefore very great. An attempt was made to settle the question at the International Naval Conference at London in 1908-09, but it too resulted in failure. During the World War Germany claimed and exercised the right to convert her merchantmen into war ships on the high seas but Great Britain contested the right and demanded that neutrals should refuse to recognize such vessels as lawful ships of war.<sup>2</sup> The matter therefore remains one of the unsettled questions of international law.

The eighth Convention deals with the laying of automatic submarine contact mines. The employment of these instruments of destruction by Russia during her war with Japan in 1904-05, resulting as it did in the sinking of a considerable number of neutral vessels, particularly those of Chinese nationality, had provoked much criticism and had caused the Russian methods to be denounced as inhumane and contrary to international law.<sup>3</sup> The matter was accordingly brought to the attention of the Second Hague Conference by the Chinese delegation. The Conference easily agreed that certain restrictions upon the employment of mines were highly desirable

<sup>1</sup> The provisions of the Convention being regarded as a corollary of the Declaration of Paris and as a guarantee against a return to a more or less disguised form of privateering, which the American government had never formally renounced, because of the refusal of the other powers to agree to exemption of private property from capture at sea, the American delegation refrained from signing the Convention.

<sup>2</sup> Garner, *International Law and the World War*, Vol. I, p. 385.

<sup>3</sup> See especially Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, p. 93.

Convention now under consideration it was declared to be expedient that naval bombardments should be governed by rules of general application, which would safeguard the rights of the inhabitants and assure the preservation of the more important buildings, by applying as far as possible to this operation of war the principles of the Convention of 1899. The Convention therefore forbade the bombardment of undefended ports, towns, villages, dwellings, or buildings by naval forces, and it strengthened the prohibition by the requirement that a place could not be bombarded solely because automatic contact mines were anchored off the harbor. In short, the presence of mines off a port must not be regarded as giving it the character of a defended place. But it added that military or naval works, war depots, workshops, and similar establishments susceptible of military use in the harbor are not to be included in the prohibition. They may therefore be destroyed by the naval forces if all other means are impossible. Likewise the presence of a ship of war in the harbor removes the place from the category of undefended ports. This exception was merely declaratory of the existing rule. Bombardments are authorized, after due notice, to enforce compliance with requisitions for military supplies or provisions. A commendable provision is that which forbids the bombardment of undefended places on account of non-payment of contributions as distinguished from requisitions. Chapter II of the Convention undertakes to regulate the bombardment of fortified places and defended towns and imposes upon naval commanders the obligation to take all necessary measures, to spare as far as possible, sacred edifices, buildings used for artistic, scientific, or charitable purposes, as well as historic monuments, hospitals, and places where the sick and wounded are gathered. It is also made the duty of the inhabitants or local authorities to designate to the naval authorities all such places by means of a conventional sign. Finally, it is made the duty of the attacking authorities, whenever the military situation permits, to do

their utmost to warn the local authorities before commencing a bombardment.

The preponderance of opinion, if not existing custom, already forbade most of the acts against which the Convention was directed, but there was more or less fear that they might be committed in a future war, and it was therefore thought advisable to prohibit them formally and in express terms.<sup>1</sup> Like other Hague conventions it was, however, flagrantly violated by at least one of the belligerents during the World War.<sup>2</sup>

The eleventh Convention (the tenth has already been discussed) lays down certain restrictions upon the right of capture in maritime warfare. The object, as stated in the preamble, was to "harmonize in the common interest certain conflicting practices of long standing," to "commence the codification through general regulations of the guarantees due to peaceful commerce and legitimate business and the conduct of hostilities at sea." It was therefore considered expedient to embody formally in written mutual engagements the principles which had hitherto remained in the uncertain domain of controversy or which had been left to the discretion of governments. The Convention declares that the postal correspondence of both belligerents and neutrals, whether its character be official or private, when found on the high seas on board a neutral or enemy ship, shall be inviolable and in case the ship carrying it is detained the correspondence shall be forwarded by the captor to its destination with the least possible delay. The immunity thus conferred, however, was not to cover correspondence destined to or proceeding from a blockaded port nor was the inviolability in any case to be interpreted to exempt neutral mail steamers from the operation of the laws and customs of maritime war applying to neutral ships in general. They may therefore be searched,

<sup>1</sup> Concerning the character and importance of the Convention see an article by J. B. Scott in 11 *Amer. Jour.*, pp. 285 ff.

<sup>2</sup> As to the instances and details see my *International Law and the World War*, Vol. I, Ch. 17.

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not to serve on an enemy ship during the war. The same immunity was extended to officers and crews of enemy nationality, subject to the same condition. Altogether the Convention was conceived in a highly humane spirit, and in conferring an immunity upon postal correspondence, especially, it marked a distinct advance.<sup>1</sup> Moreover, in exempting from capture certain classes of enemy ships it represented a limited concession to the general principle of immunity of private property for which the American delegation contended.<sup>2</sup>

A very important convention was the twelfth, which provided for the creation of an international prize court. The creation of the court was in response to an increasing sentiment against the existing practice under which the prize courts of belligerents are the final judges as to the legality of captures made by their naval forces. True, it had always been asserted by prize courts that such courts were in fact international tribunals and that they administered international law. But in reality this was largely a fiction, for prize courts were everywhere organized and constituted by national authority, and they administered the prize law of their own country, whenever there was a divergence between it and international law. The creation of an international prize court was intended to alter this situation by substituting a truly international tribunal, administering international law, and to which appeals might be carried from national prize courts. In the absence of treaty stipulations covering the questions at issue the court was to apply the "rules of international law," and if there were no generally recognized rules, it should "decide in accordance with general principles of justice and equity." But as there was much uncertainty as to what were the "rules of international law," the British government declined to ratify the Convention until there

<sup>1</sup> Report of the American delegation.

<sup>2</sup> As to the character of the convention see an article by Judge S. E. Baldwin in 2 *Amer. Jour.*, pp. 307 ff.



should be an agreement on this matter, and no such agreement being reached, the international prize court was never brought into existence.<sup>1</sup>

The thirteenth and last of the Conventions of 1907 undertakes to regulate the rights and duties of neutral powers in case of maritime war. It is a sort of supplement to the Convention regulating the rights and duties of neutral powers and persons in case of war on land and represents an attempt to "conventionalize" the progress that had been achieved during the past half-century in respect to the development of the law of neutrality. It constitutes a code of 33 articles which define the rights and duties of neutrals in maritime warfare, on the one hand, and the corresponding duties of belligerents, on the other. Belligerents are forbidden to commit acts of hostility within the territory or territorial waters of neutrals and to make use of neutral territory or ports as bases of naval operations or for the procuring of supplies and equipment. Neutrals are likewise required to prevent such acts or operations from being performed within their jurisdiction. Certain restrictions are also imposed on the right of belligerent men-of-war to sojourn in neutral harbors, to revictual and to take on coal. An important provision is that (art. 21) which forbids the taking of prizes into neutral ports except in case of unseaworthiness, stress of weather, or for want of fuel or provisions, and when admitted for either of these reasons the vessel is required to leave as soon as the circumstances which justify its entrance are at an end.<sup>2</sup> This prohibition is quite in harmony with the present notions

<sup>1</sup> Concerning this Convention see three articles in 2 *Amer. Jour.*, pp. 458-507, by Mr. C. N. Gregory, Mr. Justice H. B. Brown, and Mr. T. R. White. I have discussed the project for an international prize court more at length in Lecture VIII; see also Lecture III.

<sup>2</sup> The nature of this prohibition was interpreted by the Supreme Court of the United States in the case of the *Appam*, a German prize taken into an American port during the World War. For details see my *International Law and the World War*, Vol. II, pp. 439-442, and the citations there given. See also Lecture VIII below.

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The fourteenth Act of the Conference consisted of a brief declaration by which the parties agreed to renew the declaration of 1899 forbidding the launching of projectiles and explosives from balloons. The duration of the original declaration had been limited to five years and had consequently expired on July 28, 1904, leaving the matter with which it dealt unregulated. The Conference of 1907, however, was still unwilling to make the prohibition permanent, and it was accordingly limited to a period ending with the close of the third peace conference. It may also be remarked that many states which had ratified the declaration of 1899 declined to do so in 1907, thus indicating their unwillingness to surrender the advantages of a mode of warfare the possibilities of which had been demonstrated since the first conference. In fact, only about half the states represented at the Conference of 1907 signed the declaration, and those not signing included some of the most important powers. The declaration can therefore hardly be recognized as a rule of international law. It should be said, however, that the Conference of 1907 did forbid the bombardment of undefended places by *any means whatsoever*, and this prohibition would doubtless include the dropping of explosives and projectiles from balloons on such places.

Such, in brief summary, were the achievements and failures of the Second Hague Conference. To many persons the sum-total of the results accomplished were deeply disappointing and the failures were the object of much criticism in the press and elsewhere.<sup>1</sup> Little or nothing, it was said, had been accomplished for the promotion and safeguarding of the general peace.

<sup>1</sup> The London *Times*, for example, declared that the Conference was "a sham and has brought forth a progeny of shams, because it was founded on a sham. We do not believe that any progress whatever in the cause of peace, or in the mitigation of the evils of war, can be accomplished by a repetition of the strange and humiliating performance which has just ended." Quoted by Choate in his *The Two Hague Peace Conferences*, p. 56.

A multiplicity of conventions, to be sure, had been formulated and adopted, but they represented mainly an attempt to humanize the conduct of war, rather than to prevent war itself, which was the great object which all desired. The prohibitions and restrictions which they sought to impose upon belligerents would not be observed in the stress and strain of conflict. They were little more than platonic resolutions addressed to the conscience of belligerents ; they were without sanctions and would prove ineffective in restraining those who in the face of military necessity would find it to their interest to disregard them. No agreement had been reached on many of the most important matters, while other agreements represented undesirable compromises and, in some cases, even retrogression. From first to last, the Conference had exhibited a lamentable timidity and an unwillingness to impose effective obligations and responsibilities upon states.<sup>1</sup> And too often where obligations had been imposed their value had been largely nullified through attenuating clauses which allowed belligerents to avoid them on the ground of "military exigencies," "military necessity," "exceptional circumstances," and the like. Yet without these reservations, it is almost certain that the conventions would not have been ratified. It was not, therefore, the conferences which deserved to be reproached so much as the governments whose views they were endeavoring to give effect to. It was clear also that a large part of the general public had expected more than could have been reasonably hoped for.<sup>2</sup> It was unfortunate that both assemblies should have been officially and popularly characterized as "peace conferences." This

<sup>1</sup> Compare Hill, *Amer. Jour.*, 1920, p. 388.

<sup>2</sup> Compare Westlake, a friendly critic, who remarks that the reputation of the Conference "suffered because too much was expected from it by those whose influence was most concerned in calling it into being." "But," he adds, "it was a great event." The procedure which it initiated and the real, though unassuming, work which it did, ensure that "it will not be forgotten either in international law or in international politics."—*Collected Papers on International Law*, p. 564.

designation accentuated the popular belief that they had been called into existence for the primary purpose of devising means for establishing the reign of perpetual peace—an achievement which represented an ideal rather than a practical possibility,—and the failure of either conference to accomplish it served to discredit, in a certain measure, the work of both. It would have been better had they been called conferences on international law.<sup>1</sup>

• It was clear at the outset that the time was not yet ripe for the more radical measures of disarmament or general obligatory arbitration. It was equally clear that no single conference could agree upon rules and machinery which would at one stroke transform the world into a new and more perfect order. The ultimate goal could only be arrived at through the slow and progressive processes of a series of conferences. Optimists, however, were not lacking who considered that the achievements of the conferences represented substantial progress. In his letter transmitting the Conventions of 1907 to the Senate, Secretary Root ventured to say that "the work of the Second Hague Conference...presents the greatest advance ever made at any single time toward the reasonable and peaceful regulation of international conduct, unless it be the advance made at the Hague Conference of 1899. The achievements of the Conferences justify the belief that the world has entered upon an orderly process through which, step by step, in successive conferences, each taking the work of its predecessor as its point of departure, there may be continual progress toward making the practice of civilized nations conform to their peaceful professions." On another occasion he thus stated his views concerning the importance of international conferences in the

<sup>1</sup> Compare Lémonon, *op. cit.*, p. 783, and Lawrence, *International Problems and the Hague Peace Conferences*, p. 48, who regrets that the conferences were styled "peace" conferences.

development of international law and the processes by which progress is achieved :

"The question about each international conference is not merely what it has accomplished, but also what it has begun, and what it has moved forward. Not only the conventions signed and ratified, but the steps taken towards conclusions which may not reach practical and effective form for many years to come, are of value. Some of the resolutions adopted by the last conference do not seem to amount to very much by themselves, but each one marks on some line of progress the farthest point to which the world is yet willing to go. They are like cable ends buoyed in mid-ocean, to be picked up hereafter by some other steamer, spliced, and continued to shore. The greater the reform proposed, the longer must be the process required to bring many nations, interests, prejudices, into agreement. Each necessary step in the process is as useful as the final act which crowns the work and is received with public celebration."<sup>1</sup>

When all is said against the achievements of the Hague Conferences that can be said, it must be admitted that they constituted an important landmark in the history of the development of international law and of international relations. For the first time in the history of the world, representatives of practically all the states had assembled in common council in time of peace for the discussion of questions of common interest to them all and particularly for the great purpose of promoting international justice and peace.<sup>2</sup> As Mr. Root well said, the conferences "developed

<sup>1</sup> Root, *Addresses on International Subjects* (Edited by Bacon and Scott), p. 129.

<sup>2</sup> Compare the remarks of M. Nelidow, president of the Second Conference, quoted in Lémonon, p. 759 ; also Darby, *International Tribunals*, p. 57 ; Root, *Addresses*, p. 139 ; Choate, *The Two Hague Conferences*, p. 57 ; and Scott, in 11 *Amer. Jour.*, 917. Even in Germany, where there was little enthusiasm for the Hague Conferences, their work found commendation among distinguished jurists, such as Schücking,

a new method and a new power for the betterment of international conduct, far superior to the ordinary rules of diplomatic intercourse, far broader in its scope, far nobler in its purpose." Through the acceptance of a large number of conventions which bound the states of the world together for certain common purposes and the constitution of a court of arbitration with its administrative council and bureau, supported by the states in common, the long discussed Society of Nations received for the first time a legal organization.<sup>1</sup>

The Second Conference itself, although fully aware that it had failed to solve some of the more important problems for which it had been called and that its work had fallen far short of the expectations of the public, was convinced that the efforts begun should be continued and the unfinished work carried forward, so far as possible, to completion.

Secretary Root, who was much impressed with the value of international conferences, even though the concrete results

Zorn, von Stengle, Liszt, Nippold, Wehberg, and others. See their opinions as quoted in Schückung, *International Union of the Hague Conferences*, pp. 23 ff.; also the opinion of the *Norddeutsche Allgemeine Zeitung*, quoted in Darby, *Int. Tribunals*, p. 697. Stoerk, however, thought the results were not sufficiently encouraging to justify a third conference and that they had rather been hurtful than helpful to the development of international law. Triepel and von Bar were of the opinion that some good results had been accomplished, notably the codification of the laws of war, but that in other respects the conferences were a failure. Schückung, *op. cit.*, p. 24.

A severe criticism of the work of the Hague Conferences is made by Professor Pillet of France. See his *Les Conventions de la Haye du 29 Juillet, 1899 et du 18 Octobre, 1907* (1918); also his *La Guerre Actuelle et le Droit des Gens*, 23 *Rev. Gén.* (1916), pp. 18 ff. He not only criticizes the solutions reached, but also denies that the conventions have had any real utility. They were, he says, condemned at the outset and their ineffectiveness was demonstrated by the events of the World War.

<sup>1</sup> Such was the thesis of Professor Schückung of the University of Marburg. See his work *International Union of the Hague Conferences* (p. 61) being an English translation by Chas. G. Fenwick of Schückung's German work entitled *Der Staatenverband der Haager Konferenzen* (1912).

might often appear inconsiderable, instructed the American delegates to the Second Conference to advocate the holding of further conferences within fixed periods. This they did with success, and the Conference of 1907 adopted a resolution recommending the holding of a third conference within a period corresponding to that which had elapsed since the preceding conference. There were some who desired to see the Hague Conference made a permanent institution meeting automatically at regular intervals of about seven or eight years.<sup>1</sup> Had the recommendation been carried out the third conference would have assembled during the year 1915, but unfortunately the arrival of that year found Europe in the throes of a great war, and of course the Conference was not held. To some the war itself was regarded as a result of the failures of the two conferences already held, and although this judgment is unduly severe, it must be admitted that the idea of periodic conferences has temporarily, we hope, been to some extent discredited in the popular mind. The fact is, however, the war demonstrated, as nothing else could have done, the necessity of future conferences, not only for the purpose of devising more effective means for preserving the peace, but for rehabilitating, revising, and strengthening the whole fabric of international law.

One of the handicaps under which both conferences worked was that no preliminary arrangements had been made for their organization and procedure. It was left therefore for the Russian President of both conferences to determine these matters and it caused no little dissatisfaction.<sup>2</sup> Moreover, the

<sup>1</sup> See Choate, *The Two Hague Conferences*, p. 83. Choate says: "We had hoped to see established some machinery by which automatic action should take place and the conference be called without waiting for the action of any particular nation." The American delegation proposed that the third conference be called to meet on the 15th day of June, 1914, but there was objection to fixing an exact date. It was then proposed to fix the time at "about 1914," but this phraseology was considered too definite and the recommendation as stated above was finally agreed upon. Choate, *op. cit.*, p. 85.

<sup>2</sup> See the criticism in 6 *Amer. Jour.*, 202.



proposals laid before the conference, had not been printed and studied in advance; nothing had been done in the way of preparation for the difficult work to be undertaken. The consequence was that a large number of imperfectly elaborated proposals were submitted to the conferences in the early days of their sessions which had to be printed and distributed, referred to commissions and studied before the real work of the conferences could proceed. The result was much loss of time was involved in organizing the conferences and preparing the necessary preliminary studies which should have been done in advance.<sup>1</sup>

Secretary Root in his instructions to the American delegates had called attention to this defect and had requested them in proposing a third conference to urge that provision be made for arranging the machinery by which the conference might be called and that the details of the program should be worked out instead of leaving the whole matter to the initiative of any one power. He pointed out that such a procedure had been adopted in the case of the Third Pan-American Conference of 1906.

The desirability of some such preparatory work being undertaken in advance impressed the Second Hague Conference, and in its recommendation for a third conference it called attention "to the necessity of preparing the labors of that Conference sufficiently in advance to have its deliberations follow their course with the requisite authority and speed." It was further suggested that a "preparatory committee" be charged by the different governments about two years in advance of the

<sup>1</sup> Compare Lémonon, p. 785. Compare also the remarks of Professor Zorn, quoted by Schückung, *op. cit.*, 190. Westlake, speaking of the Second Conference, remarked that "it launched into a great variety of topics almost wholly unprepared by official discussion and of which some, as the British proposal of the abolition of contraband of war, had not been mooted even in scientific assemblages, though not quite unknown to scientific literature." *Collected Papers*, p. 534.

probable meeting of the Conference, with the duty of collecting the various propositions to be brought before it, to seek out the matters susceptible of an early international settlement, to prepare a program and to propose a mode of organization and procedure for the consideration of the various governments.<sup>1</sup> Under such an arrangement the Conference would not be organized and its method of procedure determined by a single power as was largely the case with the two Hague conferences; the program would be prepared in advance and communicated to the different governments in time to enable them to formulate their views; these views would then be assembled and printed in advance of the meeting and distributed at the opening session and the delegations supporting or opposing them would no doubt be already supplied with the necessary technical information collected and digested by experts designated by their own governments.<sup>2</sup>

It remains, finally, to speak of the action taken by the various states upon the conventions adopted at the Hague. Those of 1899 were ratified by all the powers represented at

<sup>1</sup> On June 10, 1912, the President of the United States appointed an advisory committee to consider proposals for a program for the next conference, and it made an elaborate preliminary report on January 31, 1914. The President, through the Secretary of State, requested the American diplomatic representatives accredited to the governments which took part in the Second Conference to propose to those governments that the duties of the international preparatory committee contemplated by the Final Act of the Second Conference be committed to the administrative council of the Hague Permanent Court of Arbitration. Text in 8 *Amer. Jour.*, 335. Nothing appears, however, to have resulted from the proposal. As to the value of the preparatory work referred to above and the character which it should take, see the interesting observations of Schücking, *op. cit.*, p. 205.

<sup>2</sup> An improvement upon the Hague methods of procedure was made by the International Naval Conference of 1908-09. The governments represented communicated to the British Government in advance detailed memoranda of their views on the various subjects listed on the program, and these were collected, appropriately arranged, and distributed among the several delegations. In this way intelligent consideration of the proposals, as well as dispatch of business, was considerably facilitated.

the First Conference and they were adhered to by a considerable number of powers not represented (the number ranging from seventeen in the case of the Convention for the pacific settlement of international disputes to twenty-one in the case of the Convention relative to the laws and customs of war on land.)<sup>1</sup> As to those of 1907 there was much less unanimity. Of the forty-four powers represented at the Second Conference, the Argentine Republic, Bulgaria, Chile, the Dominican Republic, Ecuador, Greece, Italy, Montenegro, Paraguay, Persia, Peru, Servia, Turkey, Uruguay, and Venezuela—fifteen all together—appear never to have ratified any of them.<sup>2</sup> With two or three exceptions, however, the non-ratifying powers were relatively unimportant states. It should also be said that a good many of the conventions were ratified by certain states with reservations as to particular articles.<sup>3</sup> Some states, also, which ratified most of the conventions declined to ratify certain others. Thus Great Britain refused to ratify Conventions No. V, X, and XIII. Six of the above-mentioned non-ratifying powers (Bulgaria, Greece, Italy, Montenegro, Servia and Turkey) were belligerents during the World War, and in consequence of the so-called "general participation" clause, which was a part of each convention and which declares that its stipulations are not applicable except between the contracting powers, and then only when all the belligerents are parties thereto, none of the conventions of 1907 were legally binding upon any of the belligerents during the World War. All the belligerents, however, having ratified the Conventions of 1899, the latter were binding upon all, and since several of the most important Conventions of 1907 were merely revisions of the corresponding Conventions of 1899, the conduct of the belligerents was in large part limited by the

<sup>1</sup> See the list with dates of ratification or adhesion in Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 81, 129, and 178; also table on pp. 230-232.

<sup>2</sup> See the table in Scott, *op. cit.*, pp. 236-239.

<sup>3</sup> See the reservations in Scott, pp. 240 ff.

Hague regulations. It should also be remarked that a large number of the rules embodied in the Hague conventions of 1907 were not new rules but were merely declaratory of the existing custom and practice and as such they were binding upon the belligerents, independently of the status of the conventions in which they were incorporated.

## **LECTURE III**

### **Development of the Conventional Law of Maritime Warfare ; The Declaration of London.**

The opening of the twentieth century found the law of maritime warfare in a much more unsettled and undeveloped form than that of land warfare. Sir Edward Fry at the Second Hague Conference characterized it as "not much more than a chaos of opinions which are often contradictory, and of decisions of national courts based upon national laws." The conference of Paris of 1856 had formulated four rules : one abolishing privateering, one providing for the immunity from capture of enemy goods, with the exception of contraband, under a neutral flag ; one providing the same immunity, subject to the same exception, for neutral goods under an enemy flag, and another making the legality of a blockade dependent upon its effectiveness. These rules, originally binding only upon the signatory powers, were ultimately accepted, either by formal accession or through tacit acquiescence, by all the powers, and thus they became an established part of the general body of international law. But occupying less than seven lines of a printed page and limited to the briefest statement of general principles they constituted in no sense a code of international maritime law, not even in respect to the matters with which they dealt. They contain no indications as to the tests to be applied in determining enemy character, or as to what constitutes contraband or what shall be the penalty for carrying it or what rules shall be applied in determining its liability to capture. Moreover, nothing is said in regard to the other questions relating to blockade such as have frequently been matters of controversy. The Geneva and

Hague Conferences succeeded in formulating a body of rules relating to the conduct of war on land so considerable that in its *ensemble* it approximates in some degree a code of law on the subjects with which they deal ; but little had been accomplished toward giving the law of maritime warfare the same precision and definiteness. The first Hague Conference did not occupy itself at all with questions of maritime law. The program of the second Conference apparently contemplated the preparation of a maritime code to supplement the rules of land warfare adopted by the first Conference, but the results were disappointing. To be sure, several conventions dealing with certain matters of maritime war were adopted but they were not comprehensive and have been characterized as "more remarkable for what they omitted than for what they settled," and that "in many cases where they professed to establish a rule, its value was whittled away by its vague statement."<sup>1</sup> Among the conventions adopted were those relative to the status of enemy merchant ships at the outbreak of hostilities ; the conversion of merchant ships into war vessels ; the adaptation to maritime war of the principles of the Geneva Convention ; the laying of automatic submarine contact mines ; naval bombardments ; restrictions upon the right of capture in naval warfare ; the rights and duties of neutral powers in naval warfare ; and one providing for the creation of an international prize court. The list seems formidable enough, but an examination will show that the securities which some of them, such as the mine-laying convention, were designed to provide were hopelessly ineffective ; that others, like the convention relative to the conversion of merchant vessels into warships, left important questions unsettled ; while none of them pretended to deal with the more important questions of blockade, contraband, visit and search, destruction of prizes, transfers of flag, unneutral service, and the like. The

<sup>1</sup> Bentwich, *The Declaration of London*, p. 1.

Conference itself appears to have been disappointed at its failure to reach an agreement on these matters and to give the world a more complete and efficacious body of law governing maritime warfare, as it had done with respect to land warfare. In the final act of the Conference, therefore, the opinion was expressed that "the preparation of regulations relative to the laws and customs of naval war should figure in the program of the next Conference and that in any case the powers might apply, as far as possible, to sea warfare the principles of the convention relative to the laws and customs of war on land." The Institute of International Law, deeply impressed with the desirability of a body of conventional rules regulating the conduct of naval warfare to supplement and complete the convention respecting the laws and customs of war on land, at once occupied itself with the task of preparing the project of a code to serve as a basis for the deliberations of the next Conference, and this task was completed in 1913 when its manual of the laws and customs of maritime warfare was adopted.<sup>1</sup> Unfortunately, however, on account of the tragic events which soon followed, the third Conference was never called. The adjournment of the second Conference, therefore, left the international law of maritime war, as stated above, in a more or less chaotic condition. The conventional law, as it then existed, consisted merely of the four brief rules of the Declaration of Paris together with the conventions of the second Hague Conference referred to above, to which may be added certain common rules relating to such matters as contraband, right of search, blockade, convoy, treatment of enemy merchant vessels and the like, found in bilateral treaties concluded between different states. While there were certain common provisions in these treaties there were also many divergencies. There were also a goodly number of naval prize manuals or ordinances issued by the governments of

particular states, but the rules contained in some of them often conflicted with those of others and in any case they were binding only upon the states promulgating them. The remaining, and by far the larger part, of prize law consisted of customs and usages ; of decisions of national prize courts and of opinions of jurists and text writers, so far as they were received as law. It goes without saying that some of these rules were contradictory and there was a considerable divergence of opinion among the governments, the prize courts and the text writers of different countries, and particularly between those of England on the one side and those of continental Europe on the other, the opinion and practice of the United States being sometimes in harmony with that of Great Britain, sometimes with that of the continental powers. To a large extent each belligerent was free in its conduct of naval operations to act upon its own understanding of what the law required and what it forbade. In theory, prize tribunals, though regarded as municipal courts, applied international law. Lord Stowell, who had built up in large measure the prize law of England, said in the case of the *Maria*, that although the "seat of judicial authority" was locally in the belligerent country, the "law itself had no locality," and that it was the duty of admiralty judges "not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral, some belligerent." But this fine statement, which did honor to the great judge who uttered it, and which still represents the view that prize courts everywhere profess, expressed rather an ideal than an actual fact. In reality, in the very case in which this view was enunciated, Lord Stowell disregarded it when he upheld the English practice of searching neutral merchant vessels under convoy, a practice which other nations generally condemned. The prize courts of different states, in his day and since, have always followed the views traditionally



held in their own countries, when there was no conventional law laying down a different rule. Thus the Supreme Court of the United States during the Civil War applied the doctrine of ultimate destination to the carriage of contraband although that doctrine was almost unanimously condemned by the rest of the world. Similarly, the English courts and those of the United States applied the rule that the violation of a blockade may begin with the sailing of a vessel from its home port although the view of continental Europe generally has been that there can be no violation until the vessel attempts to pass the blockading line. In the same way, the English courts have uniformly, in determining the liability of property to capture, applied the test of domicile whereas the almost universal rule of continental Europe makes the nationality of the owner the test. Whenever, therefore, there is no universal conventional rule, the prize courts of each country are free to follow the opinion, the practice, or the law of their own country, and this they have generally done.

During the World War the Secretary of State of the United States, Mr. Lansing, in an address at the first meeting of the American Institute of International Law called attention to the unsatisfactory state of the rules of international law, particularly those governing the relations between belligerents and neutrals during maritime war, and suggested that a committee be appointed "to study the problem of neutral rights and duties, seeking to formulate in terms the principle underlying the relations of belligerency to neutrality rather than the express rules governing the conduct of a nation at war to a nation at peace." Secretary Lansing pointed out that the existing rules which had grown up during the past 125 years had been in some cases differently interpreted by courts of different countries; that they had frequently been found inadequate to meet new conditions of warfare; and that as a result every war had changed, modified or added to the rules, generally through the process of judicial decisions. In this way the prize courts of

belligerents had become the interpreters of belligerent rights and neutral obligations and their interpretations had revealed evidence of unconscious prejudice arising from the feeling of national patriotism and over-appreciation of belligerent necessities.

Such was the state of international maritime law when the powers were called on to ratify the Hague Convention of 1907 providing for the creation of an international prize court. Article 3 of the Convention allowed an appeal to be taken on both questions of law and fact in certain cases from the decisions of national prize courts. Article 7 provided that when the questions of law to be decided were covered by a treaty in force between the belligerent captor and a power which was itself, or whose citizen or subject was, a party to the proceeding, the court was to be governed by the provisions of the said treaty. But in case there was no treaty provision covering the question the court should apply "the rules of international law." And if there was no generally recognized rule of international law on the subject, the court was to give judgment "in accordance with the general principle of justice and equity." Now, as a matter of fact, as has already been pointed out, many questions were unregulated by treaties; there was considerable divergence of opinion and practice concerning various rules of maritime war, and as to other questions, there were no settled rules at all. In short, the law to be applied by the court was in a very unsettled and uncertain condition. Had the laws of maritime war been codified in a measure as those of land warfare had been, the problem would have been fairly simple. In that case the international prize court would have had only to apply them as national courts apply their municipal law. But in the absence of a treaty provision or a generally recognized customary rule covering the question involved, the court would clearly have to make a rule founded on the "general principles of justice and equity." In other words, the court would have to create the law before applying it. It would therefore exercise legislative as well as

judicial functions. This was admitted by M. Renault in his report on the prize court convention.<sup>1</sup> In respect to such matters as continuous voyage, the test of enemy character, the transfer of belligerent merchant vessels to neutral flags, the places where the conversion of merchant vessels into warships might take place, the liability of convoyed vessels to search, the area in which the capture of a blockade-runner might be legally made, and other questions concerning which there was no generally recognized rule, the court would itself be obliged to determine the rules before applying them. When this became evident, it caused much concern in England especially, because it was felt that the entrusting of legislative power to the proposed prize court would expose the British Empire to serious disadvantages if not grave dangers. The prize court was to be composed of fifteen judges of whom only one would be a representative of the British Empire. The majority of the court would, therefore, consist of representatives of countries whose national interests and traditional opinions and practices concerning international maritime law were different from those of England and in all probability its decisions would be contrary to the views held and acted upon in that country. More and more it became evident that the greater the uncertainty of the law to be applied by the court, the more unlimited would be its power to create the law, and hence the greater the danger to which the interests of England would be exposed.

In this situation, the British Government took the initiative in calling a conference of the maritime powers for the purpose

<sup>1</sup> Text in Supp. 8 to *Amer. Jour.* (1914), pp. 88-144. Compare also an editorial in 2 *ibid.*, p. 833.

Professor Westlake expressed the opinion that justice and equity would forbid the international prize court from reversing the decision of a national prize court based on the traditional views and judicial doctrine of the country. In other words, the international court would be bound to follow the decision of the national court upon questions concerning which there was no recognized general customary rule. *International Law*, Part II, p. 294. But this view hardly seems reconcilable with the plain language of article 7 of the prize court convention.

of reaching an agreement "as to what are the generally recognized principles of international law" within the meaning of article 7 of the prize court convention and of formulating the rules which, in the absence of special treaty provisions applicable to a particular case, the court would be bound to observe in deciding appeals brought before it. The conference assembled at London in December, 1908, thirty-seven delegates, representing Austria-Hungary, France, Germany, Great Britain, Italy, Japan, the Netherlands, Russia, Spain and the United States being present. It was composed of jurists, diplomats and naval officers a goodly number of whom had been delegates to one or the other of the Hague Conferences. The results of its deliberations were embodied in a Declaration consisting of seventy-one articles, concerning the laws of naval warfare.

In the invitation addressed by Sir Edward Grey to the powers to send representatives to the conference he adverted to the divergent views and practices of the nations, such as had been revealed during the discussion at the second Hague Conference and of the failure of that body to arrive at an agreement upon many of the questions there discussed. The impression had been gained, he said, that the international prize court would not meet with general acceptance so long as the vagueness and uncertainty of the law which the court was to apply existed. The questions which the British Government considered to be of the greatest importance upon which an understanding should be reached were those as to which divergent rules and principles had been enforced in the prize courts of different nations. These questions related to contraband, convoy, blockade, continuous voyage, destruction of neutral prizes, unneutral service, conversion of merchant vessels into warships, transfer of merchant vessels from belligerent to neutral flags, and the test to be applied in determining enemy character.

The deliberations of the conference were greatly facilitated by the preparatory work which had been undertaken by the

British Government. The powers represented were requested to communicate in advance memoranda containing statements of their views concerning the different subjects on the program.<sup>1</sup> Under the direction of the British Government summaries of these memoranda accompanied by observations and draft proposals were prepared for the use of the conference and the latter were utilized as bases of discussion. From first to last the delegates were animated by a spirit of co-operation and of good will and an earnest desire to reach an agreement on all questions as to which there was a divergence of opinion and practice. There was a ready disposition to compromise and make concessions, and in consequence of this policy of mutual give and take, the success of the conference was quite remarkable, an agreement being reached on all questions listed on the program except two.

The limits of this lecture do not permit of a full analysis of the Declaration adopted; it must suffice therefore, to point out briefly the conclusions reached in regard to the questions on the program concerning which the view and practice of nations were divergent. At the outset, it may be remarked that the rules of the Declaration deal only with the relations between belligerents and neutrals, and not at all with the rights and duties of belligerents in their relations with one another. It covers therefore, only a part of the general field of maritime law.

In respect to blockade there had long been a difference of

<sup>1</sup> These memoranda with other documents relating to the conference may be found in a "British Parliamentary Paper," *Misc. No. 4* (1909), Cd. 4554. See also a volume published by the Carnegie Endowment for International Peace, entitled: *The Declaration of London of February 26, 1909*, being a collection of official papers and documents relating to the International Naval Conference held in London, December, 1908, February, 1909. (Editor J. B. Scott, Oxford University Press, 1919.) These two collections have been the principal sources of information upon which I have drawn in my review of the work of the conference. The literature dealing with the Declaration of London is very extensive. A fairly complete bibliography of the literature down to the outbreak of the World War, may be found in the second of the abovementioned publications, pp. 259-68.

opinion regarding the character of the notice to be given and the point from which vessels suspected of intent to violate the blockade become liable to capture. The continental view and practice was that, apart from the diplomatic notice of the proclamation of blockade, a neutral vessel was entitled to special notification entered upon its log book by an officer of the blockading squadron, when it approached the blockading line. The Anglo-American view, on the contrary, regarded such special notification as unnecessary. The decision reached by the conference was that the special notification was no longer in harmony with the conditions of modern warfare and should not be required. Anglo-American opinion had also been that a neutral vessel intending to violate the blockade was liable to capture from the moment of sailing from its port of departure and was equally liable to capture at any point during the course of its return voyage after having violated the blockade, whereas the continental powers had generally maintained that capture could only take place within the area of the blockading operations, known as the *rayon d' action*. On this question, it was England and the United States which yielded and the rule adopted limited the right of capture to the area of operations of the blockading squadron. The British delegates in the report to their Government stated that the 21 articles of the Declaration relating to blockade corresponded "substantially to the practice of this country as upheld by the decisions of British prize courts."

In respect to contraband, the differences related mainly to the question of what constitutes contraband, whether the doctrine of continuous voyage may be applied in determining its destination and what penalty should be imposed on the vessel transporting it. The subject had been discussed at great length at the second Hague Conference, but no conclusions were reached. A list of articles constituting absolute contraband was drawn up by a committee but it was not accepted or incorporated in any one of the conventions adopted. A proposal made by the British

delegation for the abolition of contraband, leaving to belligerents only the right of blockade, actually received the vote of twenty-five powers, but the vote not being unanimous, the results were not conclusive. The United States delegation then proposed the abolition of all but absolute contraband, but it too was unacceptable. The British delegates to the London Naval Conference were instructed that if a renewal of the British proposal of 1907 would prove generally acceptable, the British government would welcome the conclusion of an agreement to that effect. But it was clear from the outset that the proposal would not be favorably received and it was not therefore renewed. In these circumstances, the British delegates concentrated their efforts on obtaining as strict a limitation as possible in respect to the definition of contraband. On the continent, generally, the doctrine prevailed that goods were either contraband or non-contraband, the distinction between absolute and conditional contraband not being emphasized. In America and England, however, the distinction was regarded as fundamental and the British delegates were instructed that it would have to be recognized. This the Declaration did. A list of articles regarded as absolute contraband, and another list to be treated as conditional contraband were agreed upon. The conference went further also and agreed upon a free list, that is, a list of articles which should not be treated as either absolute or conditional contraband. The list of absolute contraband was substantially the same as that which had been agreed upon by the committee of the second Hague Conference. Some difficulty, however, was experienced in reaching a unanimous decision on the question, due to the fact that some of the delegations desired to see an extension of the list of contraband while the British and Japanese delegates objected to it and especially to the inclusion of horses and mules. The matter, however, was compromised by allowing a belligerent to make additions to the list of absolute contraband of such articles as could serve no other than war-like purposes. But there was some feeling that the liberty thus accorded was

too wide ; besides it introduced an element of uncertainty into the law. But, as M. Renault pointed out in his Report, the provision only operated for the power which made the addition and the articles added to the list would be contraband only for the belligerent making it. If articles were added which were not strictly absolute contraband and a case involving its capture should be appealed to the International Prize Court, the court would be free to declare that the addition was not legally permissible.

More difficulty still was encountered in reaching an agreement as to the conditions under which contraband was liable to capture. In the United States, if not in England and France, the doctrine of continuous voyage or ultimate destination had become an established rule. Contraband goods, therefore, discharged in a neutral port when proof existed that they were to be forwarded to an enemy port for belligerent uses were as liable to capture as if they were forwarded direct by a single voyage to the enemy port. This doctrine had been applied by the French prize courts during the Crimean War, by the United States Supreme Court during the American Civil War and Great Britain had asserted the right to apply it during the South African War. On the continent of Europe, however, the doctrine was generally rejected and at the London Conference its total abandonment was demanded in return for the establishment of the lists of absolute and conditional contraband. England and the United States were, therefore, obliged to make some concessions to the continental powers which refused to recognize the doctrine of continuous voyage. The matter was finally compromised by an agreement that the doctrine of continuous voyage should be maintained as regards absolute contraband but that it should not be applied to the carriage of conditional contraband except in the rather rare cases where the ultimate destination was a belligerent country having no sea-board.

The third question concerning contraband, upon which there was a serious difference of opinion, related to the liability of the



ships carrying it to capture. The powers were in accord that a vessel engaged in transporting contraband was liable, in certain circumstances, to confiscation equally with the goods. British opinion and practice were, generally speaking, in favor of the view that apart from any interest of the shipowners in the cargo, liability to condemnation depended upon the existence of forcible resistance or false papers. The continental powers, on the other hand, generally conditioned liability to condemnation on the proportion which the contraband goods bears to the total cargo. The instructions to the British delegates to the Conference admitted that "there is much to be said in favor of this view," particularly because it was, on the whole, favorable to neutrals, and the principle found general acceptance among the various delegations. There was, however, considerable diversity of opinion as to the exact proportion which should be adopted and it was only after prolonged discussion that an agreement was arrived at fixing the proportion at one-half the cargo. The line drawn was of course, largely arbitrary, but it was the only one upon which an agreement could be reached. There was also considerable feeling that some sort of penalty ought to be imposed upon vessels carrying contraband in quantities less than the proportion fixed and a system of fines was suggested, but it was opposed by the British delegation and no agreement was reached on the matter. The rules adopted in respect to contraband were considered at the time fairly reasonable, practicable and just to both belligerents and neutrals, but the World War proved that such was hardly the case. The distinction which the Declaration made between consignments to fortified places, military bases and government contractors, on the one hand, and consignments to commercial ports and private merchants, on the other, was shown to be, for all practical purposes, largely illogical and arbitrary. Likewise, the old distinction between absolute and conditional contraband, which the Declaration maintained, proved to be without any real basis under modern conditions.

and in practice it was abandoned by most of the belligerents during the World War.<sup>1</sup>

Closely connected with the question of contraband was that relating to the right of belligerents to search neutral merchant vessels under the convoy of warships of their own nationality. The traditional English view was in favor of the right, but it had not in fact been exercised by the British naval authorities since the early part of the nineteenth century and it had been expressly waived by the British government during the Crimean War. Practically all the other powers had opposed the British view. The instructions to the British delegates to the London Conference admitted that on account of changed conditions the original British contention had practically lost its importance and that its formal abandonment would not alter the actual situation. This attitude made easy enough an agreement by the conference to the effect that neutral merchantmen under convoy of a neutral man-of-war should be immune from search. Safe-guards, however, were provided to insure belligerents against possible abuses or frauds on the part of the convoying commander.

Regarding unneutral service, that is, the participation directly or indirectly by a neutral vessel in hostilities, as by engaging in the transportation of enemy troops or despatches for the benefit of one of the belligerents, there was no difference of opinion that such vessels forfeited the rights and privileges which belonged to them as such. At the second Hague Conference the British delegation had proposed that such vessels should be treated as having the status of "auxiliary ships" of the particular belligerent they were serving but the degree of suspicion with which it was received caused it to be withdrawn. At the London Conference the principal difficulty

<sup>1</sup> See my *International Law and the World War*, Vol. II, Ch. 32; also pp. 454 ff., for a discussion of the matter. See also Sir Erle Richards' article "The British Prize Courts and the War," in the *British Year Book of International Law*, 1920-21, pp. 11 ff.

was in reaching an agreement as to the circumstances under which a neutral vessel might be stopped by a belligerent and military persons removed from it. The continental countries had asserted a rather wide right in this respect but it had never been admitted in the United States and England. The British government had, as is well known, vigorously protested against the removal during the Civil War by an American naval commander of the Confederate commissioners, Mason and Slidell, from a British merchantman and the American government subsequently acknowledged that a wrong had been committed. In the instructions to its delegation at the London Conference, the British government stated that it would be desirable to arrive at some understanding that the inadvertent conveyance by a neutral vessel of a few individuals having the character of analogues of contraband, should not entail on such a vessel more than the minimum of interference necessary for preventing them from reaching their destination. The decision reached by the Conference on this point is embodied in article 47 of the Declaration which provides that "any individual embodied in the armed forces of the enemy, who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel." The provision clearly applies only to military persons and would not authorize the seizure and removal of diplomatic representatives or civil commissioners by the enemy, such as Mason and Slidell were.<sup>1</sup> The exact meaning, however, of the words "embodied in the armed forces of the enemy" is not clear. Do they include only those persons who have been summoned to the colors and who have actually joined their regiments? Or, do they include also those who have been summoned but have not yet joined the corps to which they belong? Professor Renault

<sup>1</sup> Compare Elihu Root, *Procs. Amer. Soc. of Int. Law*, p. 9. The American delegation were opposed to the provision, their view being that if the seizure of the individual did not justify the condemnation of the vessel, he should not be removed from it.

in his general Report accompanying the Declaration expressed the opinion that they included only those who had actually joined their corps, since, he added, it would be difficult and perhaps impossible without having recourse to vexatious measures, to pick out among the passengers in a vessel those who are bound to perform military service and are on their way to enlist. During the World War when the United States was still neutral, there was some controversy between the American government, on the one side, and the British and French governments on the other, in consequence of the removal by English or French cruisers of certain German and Austrian persons from American merchantmen bound to neutral ports. In several cases, the persons removed having formally declared their intention of becoming American citizens, were released. In February, 1915, a more difficult question was raised by the removal by a British cruiser from the American steamer *China*, of a number of German, Austrian and Turkish subjects charged with having been concerned in a plot for inciting insurrection in India. The American government protested against the removal and contended, as it had done in the former cases mentioned, that the persons removed were not "embodied in the armed forces of the enemy" and even if they were, they were not liable to seizure on a neutral steamer proceeding from one neutral port to another. But Sir Edward Grey defended the act as one which involved no infraction upon the sovereignty of any neutral state.<sup>1</sup> The question of the liability of a neutral vessel carrying military persons was raised in May, 1915, in the case of the Spanish steamer *Frederico* captured with a number of German and Austro-Hungarian *mobilisés* on board, who were returning to join the colors. The French prize council condemned the vessel on the ground that it was engaged in transporting

<sup>1</sup> The details as to the above mentioned seizures and the controversies which they raised are given in my *International Law and the World War*, Vol. II, pp. 362 ff.

"numerous passengers" who were "incorporated" in the armed forces of the enemy, within the sense of Article 47 of the Declaration of London.<sup>1</sup>

The question of the destruction of neutral prizes was included in the program of the Second Hague Conference and the British delegation endeavored to obtain the adoption of a rule condemning the destruction of neutral prizes under all circumstances and it was supported by the American delegation; but the conference was unable to reach an agreement on this as on many other questions. Regarding the right of a belligerent to destroy *enemy* prizes there was no difference of opinion, but some of the continental powers maintained also the right to destroy *neutral* prizes under certain circumstances, as where they could not be taken into a home port for adjudication, without exposing the captor to danger or without interfering in a substantial manner with his naval operations; and some continental writers maintained that the inability of the captor to spare a prize crew would justify destruction of the prize. Great Britain on the other hand, had always maintained that, in the case of a neutral ship which could not be taken into a home port for adjudication by a prize court, it should be released, since no military necessity would justify its destruction in advance of condemnation by a prize court. The instructions to the British delegates to the London Conference, stated that in the few recorded cases in which neutral prizes had been so destroyed by English captors, the prize court had decreed full compensation to the owners for what was admitted to be a wrong done to them. The conference was in agreement on the general principle that a neutral prize ought not to be destroyed, but should be taken in for adjudication by a prize court. Practically all the delegates, except those of Great Britain, admitted, however, that under exceptional circumstances and subject to the condition that the safety of all

<sup>1</sup> Text of the decision in *Rev. Gén. (1915), Jurisprudence*, pp. 17 ff.

persons on board should first be provided for, the right of destruction of neutral prizes ought to be recognized. It soon became manifest that if any agreement on the question were reached the British delegation would have to recognize this right, and this it finally agreed to do, provided adequate safeguards against abuse of the right were guaranteed and its exercise were restricted to cases of exceptional emergency. There remained then the problem of reaching an agreement as to the exceptional circumstances which should be regarded as justifying a departure from the general principle of non-destruction. The British delegation firmly refused to admit the contention of certain of the continental delegates that the inability of the captor to spare a prize crew from his own vessel with which to take the prize in, should constitute a sufficient justification for destruction, since such an admission would probably be held to authorize the destruction of neutral prizes in the majority of cases where the captor had no convenient port of his own to take them to. The conference declined to recognize expressly the British contention in respect to this matter, and, it being regarded as impracticable to enumerate exhaustively the various circumstances which should authorize destruction, it was decided not to mention any one particular contingency, since it might be interpreted to exclude others not mentioned. The decision finally arrived at, embodied in Article 47 and the following Article 48, affirms the general principle that a neutral vessel may not be destroyed but must be taken into port in order that the validity of the capture may be determined by a prize court. Article 49 deals with the exceptions to the general rule thus stated. It recognizes that, as an exception, a neutral vessel which is liable to condemnation may be destroyed if the taking it in for prize adjudication would "involve danger to the safety of the warships [making the capture] or to the success of the operations in which she is engaged at the time." Article 50 requires that provision shall be made before destruction for the

safety of all persons on board, and, Article 51 puts upon the captor the onus of proving that he acted in the face of the exceptional necessity contemplated by Article 49, failing which his government must compensate the owner. Unfortunately, the language employed in Article 49 dealing with the exceptional circumstances which authorize destruction is very general in character, it having been impossible to reach an agreement upon a more definite and specific statement. What constitutes "danger" to the safety of the captor or to the "success of his operations" is susceptible of very wide interpretation, as it was so interpreted by German naval commanders during the World War to justify the destruction of neutral prizes under almost any circumstances. Like other provisions of the Declaration it represented a compromise between conflicting views, and while for this reason it was far from satisfactory, it did provide some guarantees against arbitrary destruction of neutral vessels and the drowning of their crews and passengers. Unfortunately the restrictions which it imposed upon belligerents were disregarded during the World War, particularly by the commanders of German submarines, who destroyed hundreds of neutral merchantmen often with their crews and passengers.<sup>1</sup>

Another question which occupied the attention of the conference related to the right of shipowners to transfer their vessels to neutral registry before the outbreak of war, in anticipation of hostilities, or subsequent to the outbreak of war, in both cases for the purpose of withdrawing them from the risk of capture by the enemy. This practice had frequently been resorted to during the wars of the past. In fact, shipowners are always under a temptation upon the outbreak of a war in which their own country is a belligerent to transfer their vessels to neutral flags in order to avail of the protection which

<sup>1</sup> The matter is considered more at length in my *International Law and the World War*, Vol. II, Ch. 31.

the neutral status gives them. English and American judicial opinion and practice had always regarded such transfers as valid, irrespective of the motive, whenever the transfers were *bona fide* commercial transactions, without reservation of interest on the part of the vendor and provided they were made in accordance with the national law relating to transfers of flag. But the French and Russian practice had denied it and had affirmed the right of a belligerent to capture and condemn enemy vessels which had been transferred to neutral registers after the outbreak of hostilities. The memoranda of the powers laid before the London Conference indicated that the United States, Great Britain, Austria-Hungary, Japan, the Netherlands and Spain regarded such transfers as valid under the conditions mentioned above, while France, Germany and Russia regarded them as invalid, so far as the right of capture by the enemy was concerned. The delegates of the first mentioned group of powers made some concession to the views of the second group and the rule finally agreed upon affirmed the invalidity of transfers made *after* the outbreak of hostilities unless it was proved that they were not made in order to evade the consequences to which an enemy vessel as such is exposed. The general principle was simple enough: the onus of proving that the transfer was not made to withdraw the ship from capture was put upon the owner, not upon the captor. The rule then enumerated a series of circumstances which were to be regarded as creating an absolute presumption that the transfer had been made with this object in view.

Regarding transfers made *before* the outbreak of war the rule was inverted. In that case the presumption was that the transfer was valid and the burden of proof was on the captor to show that the transfer was made in order to evade the consequences to which an enemy vessel, as such, was exposed. But, again, certain circumstances were enumerated which were to be regarded as creating a presumption that the transfer was void; others which created a presumption that it was valid,



some of the presumptions being rebuttable, others not. As in the case of other solutions reached by the conference, the rules regarding transfers of flag represented a compromise between conflicting views and practices. The British Government, in the instructions issued to its delegates, justly remarked that a rule excluding altogether the right of transfer during war was too serious a burden to impose on any country which carried on a large trade in building and selling ships. It very properly added that the equity of the case seemed to demand that transfers should be permissible but that the belligerent affected should be entitled to inquire closely as to the *bona fides* of the transaction and that the onus should be on the owners or claimants to prove that the sale was complete and the transaction genuine rather than colorable.

During the World War some cases arose which involved an application of the rules of the Declaration relative to transfers of flag, the most notable being that of the *Dacia*, a German merchant vessel lying in an American port, which was sold by its owner to an American citizen and was duly admitted to American registry according to the law of the United States. Being captured by a French cruiser the French prize council condemned it on the ground that the owner failed to produce sufficient evidence to show that the vendor did not sell the vessel for the purpose of withdrawing it from the risk of capture.<sup>1</sup> Thus interpreted the Declaration of London would seem to allow transfers in few conceivable circumstances. The *Dacia* having been purchased by a neutral ship owner as an ordinary commercial transaction, it is not clear just how he or the Hamburg-American company (the vendor) could have been animated by the motive to withdraw the vessel from the

<sup>1</sup> Text of the decision in 22 *Rev. Gén. (1915). Jurisprudence*, pp. 83 ff. The facts are detailed in my *International Law and the World War*, Vol. I, Chapter VII.

risk of capture to which it was not in fact exposed since it was lying safely in a neutral port.

The above are some of the more important controversial questions of international maritime war law upon which the conference reached an agreement. The program included two subjects, however, upon which no agreement was reached. One of these was the test to be applied in determining the enemy or neutral character of goods captured on an enemy vessel. As to enemy goods on a neutral vessel, their immunity is established by the Declaration of Paris and the practically universal acceptance of the Declaration has removed the question of the status of such property from the domain of controversy. Regarding the status of ships themselves the London Conference easily reached an agreement upon a rule which laid down the principle that the enemy or neutral character of a ship should be determined by the flag it was entitled to fly, and it was embodied in Article 57 of the Declaration. There was a general agreement at the conference that this was a just and logical test to apply, and besides, it had the merit of simplicity. It may be remarked, however, that its defectiveness was brought to light during the World War by the action of certain shipowners in the United States in purchasing with German capital and operating under the American flag, while the United States was still neutral, of a number of merchant vessels. If Article 57 of the Declaration were applied, these vessels would have to be treated by Great Britain and France as neutral although they were enemy owned, wholly or in part. To meet this situation the British and French Governments in October, 1915, abrogated their earlier orders putting the Declaration into effect, in so far as they related to Article 57, and proclaimed in lieu of that Article a rule which declared that the test for determining the enemy or neutral character of ships should be the nationality of the owners rather than that of the flag which they were entitled to fly. In pursuance of the new rule thus adopted, several vessels flying neutral flags belonging to the American Transatlantic

Company, which it was alleged, was largely financed by German capital, were captured and condemned by the British and French prize courts. The abrogation of Article 57 was severely criticized in some neutral countries, but it must be admitted that the rule of the Declaration which made the character of the ship depend upon the nationality of its flag opened the door to "fraudulent practices on an extensive scale."

It may be remarked, however, in this connection that the British government in the instructions to its delegates at the London Conference declared that the proposition, that a ship under a neutral flag may be treated as an enemy vessel if it is enemy owned, wholly or in part, was extreme and unjust and would be difficult of application. In consequence the British Government thought "it would be right to assent to the principle that the test of the nationality of the ship should be the flag which it is entitled to fly", and, as stated above, this was the test which the conference adopted, without much discussion.

A subsidiary question which arose in connection with the discussion of the test for determining the character of ships was whether a ship should be deemed to have lost its neutral character by engaging in a trade which before the war was closed to all vessels except those flying the belligerent's own flag. Great Britain under the well known "rule of 1756" had asserted the right to treat all vessels engaging in such trade as enemy ships, and she maintained that it had become a general principle of international law. In consequence of the character of the far flung British Empire with its numerous colonial ports in all parts of the world, the matter was regarded as of vital importance to the British government, although it appears to have been overlooked in the instructions addressed to the British delegates to the London Conference. On account of the strong opposition at the conference to the British contention it was impossible to reach an agreement and the question was left open by the adoption of an addendum to Article 57, declaring that the status of such vessels "remains outside the scope of

this rule and is in no wise affected by it." The British delegation in its report to Sir Edward Grey expressed the opinion that the question would ultimately be determined by the International Prize Court in case it were brought before the court.<sup>1</sup>

Regarding the test to be applied in determining the nationality of goods carried on enemy ships there was an irreconcilable difference of opinion at the conference. On the continent of Europe, generally, the view and practice had been to regard the nationality of the owner as the proper test, whereas in England and the United States the prevailing view was that the domicile of the owner was the proper test. If the owner, irrespective of his nationality, was domiciled for purposes of trade or business in an enemy country, his goods on an enemy ship were deemed to have an enemy character; on the other hand, if he were domiciled in a neutral country, although of enemy nationality, his property was not deemed to be enemy property. The Japanese and Dutch delegates at the conference also accepted the Anglo-American rule.<sup>2</sup> The British government in the instructions to its delegates expressed the opinion that the principle of domicile appeared to be "both sounder and more practical." At the same time, it did not consider that the adoption of the rule of nationality would materially affect the interests of Great Britain and the British delegation was instructed not to insist upon the adoption of the principle of domicile as a vital matter. The British delegation stated in its report that it was disposed to agree to the adoption of the rule of

<sup>1</sup> Professor Westlake admitted that if the question should come before the International Prize Court on appeal from a British captor, the court might refuse to recognize the Rule of 1753. But, he added, the enforcement of the judgment would rest with the British government and he suggested that the British government might, in ratifying the Declaration of London, make a reservation in favor of the validity of the Rule. *Collected Papers*, p. 659.

<sup>2</sup> During the Franco-German War of 1870-71, the French government issued a decree based upon the Anglo-American view but the principle was not followed by the French prize council in its decisions.

nationality, if unanimity could be obtained. The question was considered at length by a committee consisting of one delegate from each power, but they were equally divided between the principles of domicile and nationality and after many meetings the attempt to reach an agreement was abandoned. The rule finally adopted declared that "the neutral or enemy character of merchandise found on board an enemy ship is determined by the neutral or enemy character of its owner" (Article 58). But this general statement leaves unsolved the more difficult part of the problem, since it lays down no test for determining the neutral or enemy character of the owner. Whether it is domicile or nationality remains therefore unsettled.

The other unsettled question, and the only one on the program of the conference which is not even mentioned in the Declaration, was that relating to the conversion of merchant vessels into warships. The Declaration of Paris had abolished privateering but it did not forbid belligerents from employing vessels in their merchant marine for war purposes, and during the Franco-German war and the Russo-Japanese war they had been so employed. The action of two Russian merchantmen, the *Peterburg* and the *Smolensk*, in passing through the Dardanelles in 1904 after which they were converted into warships and proceeded to make captures at sea, called the attention of the world to the possibilities of grave abuse, were the right of conversion thus claimed and recognised. The character of such vessels was considered at the second Hague Conference and a convention was adopted which defined their status and prescribed certain conditions which they must fulfil in order to be entitled to be treated as war vessels. Upon one question, however, namely, whether conversion might be made on the high seas, no agreement could be reached and the convention disposed of the matter by the following provision: "it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement and it is in no way affected by the following rules....." At the Hague

Conference the British delegation had firmly opposed a proposal to recognize the right of conversion on the high seas. One British objection raised was the facility which such a right would give the captain of a merchant vessel, capable of being converted into a warship, to seize enemy or neutral merchant vessels without warning. But a more important objection was that such vessels would be able to claim and obtain as merchantmen in neutral ports the hospitality and privileges which would be denied them if they were warships. After availing of these advantages in distant waters they could at a convenient moment hoist the naval flag and become commerce destroyers.<sup>1</sup> In this way a "monstrous race of maritime hermaphrodites" could be let loose with direful results to neutral commerce.<sup>2</sup> The view of the British government was also no doubt determined in part by the fact that Great Britain possessed ports and naval stations in every sea, in consequence of which she would herself have little need to convert her own merchantmen on the high seas in case she should desire to utilize them as warships. For the opposite reason most of the continental powers insisted that conversion on the high seas should be permitted. The British delegates at the London Conference were instructed to endeavor to bring about the adoption of a common rule which would be acceptable to all the naval powers, and to this end they were directed to make certain concessions to the continental view. But according to the report of the British delegates the powers opposed to the British view refused to admit of any restrictions upon the right of conversion and no agreement could be reached. The question therefore remains open and unsettled.

Such were the principal questions before the conference, concerning which the greatest divergence of opinion existed,

<sup>1</sup> Instructions to the British delegation to the London Naval Conference.

<sup>2</sup> Lawrence, *International Problems and the Hague Conferences* p. 197.

and such were the solutions reached. In the preamble to the Declaration it was stated that the conference had been called to "arrive at an agreement as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of the 18th of October, 1907, relative to the establishment of an international prize court", and in a preliminary provision it was added that "the signatory powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law." The accuracy of this statement may well be doubted, in view of the compromises between conflicting practices which found their way into a goodly number of the rules adopted. Nevertheless, the Declaration was a solemn expression of what the signatories deemed to be international law on the matters with which it dealt. If it was not deemed by them to be international law it could not be considered as meeting the requirements of Article 7 of the prize court convention which provided that the court should apply the "rules of international law." Speaking of the preliminary provision as to the substantial correspondence of the rules of the Declaration with the generally recognized principles of international law, M. Renault in his Report to the Conference said: "this provision dominates all the rules which follow...; the purpose of the conference has been, above all, to note, to define, and where needful, to complete what might be considered as customary law." In view of the fact that it was extremely unlikely from the outset that an agreement would be unanimously reached on all questions as to what was the existing law, the British government proposed that the rules agreed upon as statements of the existing law should be supplemented by another set of rules, dealing with matters not covered by the first body of rules which the powers might be willing to bind themselves to observe in the future. In other words, the Declaration should be divided into two parts, one a declaration of the existing rules of law, and the other, auxiliary thereto, a

declaration containing the rules which though not generally recognized as being rules of international law, the powers were willing to accept and apply. But when all decisions had been finally reached it was found upon examination that it would be difficult, if not impossible, to agree upon a clear line of division between the rules which were generally accepted as existing law and those which were admitted to be new. Had it been attempted, it would have resulted in all probability, in reducing the Declaration to a comparatively small number of articles enunciating only very general principles, leaving most of the important details respecting their application, together with many rules now widely received though not, strictly speaking, regarded as international law, to the supplementary convention.<sup>1</sup> In these circumstances it was decided not to attempt such a division, and accordingly all the rules agreed upon were incorporated in a single instrument. With the addition of a declaration that the rules agreed upon amounted in substance to a statement of the existing rules of international law on the subjects with which they dealt, the solution was acceptable to the British delegation.

The Declaration was accompanied by an elaborate general report prepared by M. Renault on behalf of the drafting committee. It elucidated and, it must be admitted, qualified in some degree certain of the rules of the Declaration. The exact meaning of some of them can, in fact, only be determined in the light of the report.<sup>2</sup> It purported to be "an exact and non-controversial commentary" which, when approved by the Conference, would become an "official commentary" and serve

<sup>1</sup> Compare the report of the British Delegation on this point.

<sup>2</sup> For example, Art. 17, relative to blockade, limits the right to capture neutral vessels to the "area of operations of the warships detailed to render the blockade effective," but it contains no definition of the area. The report, however, contains a full explanation of what the conference understood by the terms employed.



as a "guide to the different authorities—administrative, military and judicial—who may be called on to apply it."

By reason of the learning and high authority of the eminent jurist who drafted the report it was bound to carry great weight with the prize courts or other authorities which might be called upon to interpret the rules of the Declaration. The report appears to have been "accepted" by the conference at its plenary meeting on February 25, 1909, and was thereby approved as an authoritative and correct interpretation of the rules of the Declaration. During the subsequent discussion of the merits and demerits of the Declaration in England, the legal status of the report became a subject of controversy. Professor Holland maintained that it had no authentic character, and could not be regarded as an official interpretation of the rules of the Declaration. The adoption of the report by the conference, he argued, "amounted to nothing more than an expression of opinion on the part of the delegates to the conference that the report contained explanations which had satisfied themselves and might satisfy their governments, "that the convention which they were about to forward to their governments might safely be accepted." So far as governments were concerned the adoption of a report by their delegates was *res inter alios acta* and the parties alone could give it the force of an authentic interpretation, and this by means of a supplementary convention.<sup>1</sup> Professor Westlake, on the other hand, maintained that the report having been prepared by a committee of the conference and approved by the conference it represented a part of the agreement of the conference. It possessed therefore an authentic character and the Declaration must be interpreted in the

<sup>1</sup> *Letters upon War and Neutrality*, ed. of 1914, p. 188. Hon. Arthur Cohen, Lord Halsbury, and Sir Thomas Barclay expressed similar doubt as to the official character of the Report. Cohen, *The Declaration of London*, p. 13. See also Bentwich, *The Declaration of London*, p. 8.

light of the explanations which the report contained. Nevertheless, he admitted that in order to remove all doubt, it would be desirable for the parties to conclude a convention expressly affirming that the report constituted an official commentary on the articles of the Declaration with which it dealt.<sup>1</sup> The British delegation in its report, reasoning from "the principles and practices of continental jurisprudence," likewise expressed the opinion that the report would be considered as "an authoritative statement of the meaning and intention of the instrument which it explains and that consequently foreign governments and courts, and, no doubt also, the international prize court will construe and interpret the provisions of the Declaration by the light of the commentary given in the report." This was also the view expressed by the British Foreign office in a communication to the Edinburgh chamber of commerce. It pointed out that it was a well recognized practice of international conferences to appoint a drafting committee to prepare the general act and any conventions to be adopted, and where the report of the committee contained a reasoned commentary elucidating the provisions of such conventions, it becomes, if formally accepted by the conference, an authoritative interpretation of the instruments, and the conventions must thereafter be construed by the signatory powers with reference to the commentary where necessary. And it added that if the international prize court were set up it would be bound when applying the provisions of the Declaration of London as between the signatories to construe the text in conformity with the terms of the report.<sup>2</sup> This would seem to be a reasonable conclusion: it represented the continental view and practice; but it was denied by some English jurists

<sup>1</sup> *Collected Papers*, pp. 654, 667, 670. In fact when the British government put the Declaration into effect at the outbreak of the World War one of the conditions was that M. Renault's Report should be considered by the prize courts as an authoritative statement of the meaning and intention of the Declaration.

<sup>2</sup> *Parliamentary Papers*, ed. 5418, p. 21.

that it was the Anglo-American practice. The doubt which thus existed was the source of much of the English opposition to the acceptance of the Declaration. Many of the arguments made against certain of its provisions would have lost most of their force if it had been certain that the international prize court would have been bound to interpret those provisions as they were explained by M. Renault's Report.

Among the final provisions of the Declaration several deserve brief notice. Following the rule embodied in the Declaration of Paris, the London Conference decided that for purposes of ratification the Declaration must be treated as a whole. No signatory or acceding power would therefore be permitted to ratify certain parts of the Declaration and reject the other parts, since it would be inequitable to allow a government to adopt those articles which were in the nature of concessions from the other parties to its point of view and to reserve its acceptance of those which constituted concessions on its own part. Considering that the Declaration consisted in large part of mutual concessions, "a legitimate expectation," as M. Renault remarked in his Report, "would be falsified if one power might make reservations on a rule to which another power attached particular importance." Any signatory power, however, might in ratifying the Declaration make reservations as to the matters which, like the conversion of merchantmen into warships, were not settled by the conference and it might declare that it would not accept a judgment of the international prize court which was contrary to the established views and practices of its own government in respect to such matters.

By Article 66 the signatory powers undertook to insure the mutual observance of the rules contained in the Declaration in any war in which all the belligerents were parties, to issue the necessary instructions to their civil and military forces, and to take such measures as might be required to insure that it would be applied by their courts and especially by their prize courts. The attack made by one of the best known English adversaries

of the Declaration upon this provision was hardly justifiable. The powers once having ratified the Declaration, their duty to observe and apply it necessarily followed as a corollary and a formal undertaking to discharge what was already a legal obligation would hardly seem open to criticism. Article 67 provided that the ratifications should be deposited in London and Article 70 expressed the hope of the signatories that the powers not represented at the conference would accede to the Declaration.

When the Declaration emerged from the conference it encountered both commendation and criticism. Professor Westlake, who advocated ratification by his own government said: "That the ten greatest naval powers of the world should have met in conference on the laws of naval war as affecting neutrals and that after careful consideration they should have agreed on a code so comprehensive as that contained in the Declaration of London, would alone suffice to make the year 1909 memorable to all who were interested in the improvement of international relations."<sup>1</sup> A Declaration which provides rules for deciding questions arising between belligerents and neutrals, he justly remarked, tends to diminish the frequency of war no less than to humanize its conduct and he called attention to the fact that the Conference had brought about an agreement on more than one question which, on account of the consequences to national honor and vital interests supposed to be involved, had figured among the causes of war between the states represented.

In the United States, it met with general favor at the hands of jurists and naval men. Mr. Root declared that the adoption of the Declaration was an event of the first importance in the development of international peace and that it was the one indispensable forward step without which no practical

<sup>1</sup> *Collected Papers*, p. 633.

progress could be made in the further development of a system of peaceable settlement of international disputes. Its rules, he said, were wise and just and would be beneficial to the world.<sup>1</sup>

Some of them, to be sure, were the result of compromise and concession ; it may be that the solutions reached were not always ideally the best. The great merit of the Declaration consisted in the fact that it provided a body of uniform rules, in the place of uncertain and divergent rules which prevailed in respect to some of the most important matters of international maritime law. As M. Renault observed in his Report, it put " uniformity and certainty in the place of the diversity and obscurity from which international relations have too long suffered." Concerning the Declaration as a whole, M. Renault said in his report : " The solutions have been extracted from the various views or practices which prevail and represent what may be called the *media sententia*. They are not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none. They must not be examined separately but as a whole : otherwise there is a risk of the most serious misunderstandings.

The chief opposition to the Declaration came from English sources. The British delegation at the Conference signed it and recommended its ratification and the Cabinet approved and defended it. But throughout the United Kingdom it was severely attacked by chambers of commerce and associations of various kinds, by the press and by some of the leading jurists and politicians. The limits of this paper do not permit of an extended analysis of the arguments directed against it ; it must suffice to mention merely the principal objections.

One set of opponents attacked it on the ground that if put into effect it would deprive Great Britain of some of the most

<sup>1</sup> " The Real Significance of the Declaration of London ", Address before the American Society of International Law, 1912, *Proceedings*, pp. 4 ff.

important powers which she had always exercised as a belligerent ; others, for the reason that it would in like manner curtail her power as a neutral. But clearly it could not do both ; it could not reduce Britain's power as a belligerent and at the same time impair her power as a neutral. These opponents proceeded on the assumption that Great Britain should not lose as a belligerent where she gained as neutral. But manifestly a rule which adds to the rights of a nation as a belligerent must necessarily reduce its rights as a neutral. The Article relating to the destruction of neutral prizes was attacked because it permitted their destruction in exceptional cases. That the prize regulations and the practice of nearly every other country were opposed to their contention did not affect their opinion, nor did the rule of the Declaration which obligated the captor to make compensation for prizes illegally destroyed satisfy them. In any case, it is not easy to see how the rejection of the Declaration improved matters, for in that case the United States, France, Austria-Hungary, Italy, Japan, and other powers which upheld the right of destruction were left free to exercise the right without being bound by any such restrictions as the Declaration proposed to establish. The articles relating to contraband were criticized because foodstuffs were classified as conditional contraband <sup>1</sup> and because they allowed belligerents to add to the lists embodied in the Declaration. But here again belligerents would be free to do both if the Declaration were not ratified, as Great Britain and other belligerents did in fact, during the World War. The policy of the British government in respect to contraband during the late war demonstrated how

<sup>1</sup> It was pointed out by the supporters of the Declaration that Great Britain would gain as a belligerent from this provision since no nation which was a party to it could ever treat foodstuffs as absolute contraband and apply the doctrine of continuous voyage to its transportation. Ratification would therefore, increase rather than diminish Great Britain's food supply in time of war.

Compare Bentwich, *op. cit.*, p. 37 and Cohen, *op. cit.*, p. 32.

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baseless this argument was. The articles relative to blockade were objected to because the right of capture was restricted to the area of operations of the blockading squadron, but in practice this was the rule which the British prize courts had with rare exceptions always applied. It should be remarked also that the Declaration allowed a blockade runner which had violated a blockade to be pursued by a blockading cruiser beyond the area of operations. Moreover, the continental contention, opposed by Great Britain, that a vessel was entitled to a special notification by an officer of the blockading squadron, before it could be captured, was rejected by the Declaration. On the whole, the rules of the Declaration concerning blockade were substantially the same as those which were in fact applied by Great Britain. Professor Westlake was of the opinion that the law of blockade as settled by the Declaration of London left Great Britain in a more secure possession than before.<sup>1</sup> The articles relating to the determination of enemy character and the conversion of merchantmen into war vessels were criticized because they left unsettled the most important questions upon which there was a divergence of opinion. But this argument overlooked the fact that the ratification of the Declaration would not have altered in the least the situation in respect to these questions. Great Britain and the other powers would have been left in the same position as before. Whether the Declaration was ratified or not the continental powers which had always regarded nationality as the test of enemy or neutral character would continue to act upon that rule and those which claimed the right to convert merchantmen into war ships on the high seas would be free to do so, while Great Britain would be equally free to apply the rules which she insisted upon.

All in all, it would seem that Great Britain, in comparison with the other powers, would have gained more by the adoption

<sup>1</sup> *Collected Papers*, p. 638. Bentwich was of substantially the same opinion, *op. cit.*, p. 40.

of the Declaration than she would have lost. Mr. Norman Bentwich, a well known English writer on international law thus stated the case: "If we fail to ratify the Declaration of London and the International Prize Court Convention, which we have promoted, we shall gain nothing as belligerents, we shall lose much as neutrals, and we shall suffer a serious loss of prestige, and forfeit the confidence of other Powers. If, on the other hand, we ratify the two International agreements, we shall strengthen our position for all circumstances, and it will be put down to our credit that we have taken the lead in establishing the first truly international law of war, and the first truly international court of justice."<sup>1</sup>

A naval prize bill to put the international prize court convention and the Declaration of London into effect was introduced into the House of Commons in the autumn of 1910. It passed the House in due course but was rejected by the House of Lords on December 12, 1911. The bill was ably defended in the House of Commons by Sir Edward Grey, Mr. Asquith, Mr. McKenna, and Sir Rufus Isaacs and in the House of Lords by Lords Desart, Loreburn, Morley, Reay, Ritchie, Weardale, and Courtney.<sup>2</sup> The defeat of the bill carried with it, of course, the rejection of the Prize Court Convention. The Senate of the United States, on April 24, 1912, gave its advice and consent to the ratification of Declaration, but in consequence of the rejection

<sup>1</sup> *The Declaration of London*, p. 41: see also Westlake, *Collected Papers*, pp. 633 ff.; *Amer. Journal* (editorial), Vol. 6, p. 184; and Cohen, *op. cit.*, Ch. I. Westlake, Cohen and Bentwich have given a very fair and dispassionate analysis of the British arguments for and against the ratification of the Declaration. The arguments against the Declaration may be found in Bowles, *Sea Law and Sea Power* (London, 1910) and in F. E. Smith, *International Law* (4th ed., 1911). Much documentary information and some discussion may be found in *International Law Topics*, pub. of the United States Naval War College, for 1909, 1910, 1911 and 1912.

<sup>2</sup> The arguments for and against the bill are well summarized by Mr. Charles Dupuis in two articles in the *Revue Générale de Droit Int.*, Vols. 18, pp. 371 ff, and 19, p. 58 ff.



of the naval prize bill by the British House of Lords, the American ratification was never deposited at London, in accordance with the terms of the Declaration. The Italian government, although never having ratified the Declaration, issued instructions to its naval commanders in 1911 during the war with Turkey in which it expressed a "desire" that the Declaration should be observed in so far as the provisions of the laws in force in the Kingdom of Italy allowed.<sup>1</sup> It was applied by the Italian prize courts in several notable cases arising during the war.<sup>2</sup> It may also be remarked that its provisions were, in substance, incorporated in the French prize manual issued on December 19, 1912, and in the German prize code of September 30, 1912 (issued on August 3, 1914). When the Great War broke out in 1914, not one of the signatory powers, except the United States, had ratified the Declaration and even its ratification, as stated above, had not been deposited at London. And no non-signatory power had acceded to it. Animated by a desire to see its rules observed during the war, notwithstanding the fact that the Declaration as such was not legally binding on any belligerent, the Secretary of State of the United States on August 6, 1914, addressed a communication to the American diplomatic representatives accredited to the governments of the several belligerent powers instructing them to inquire whether those governments were willing to agree that the laws of naval warfare laid down by the Declaration of London should be applicable during the existing conflict, provided their adversaries would agree to such application. The communication added that the government of the United States believed that "an acceptance of these laws by the belligerents would prevent grave misunderstandings which might arise as to the relations between

<sup>1</sup> French text in 21 *Rev. Gén.*, pp. 107-109.

<sup>2</sup> See for example the cases of the *Vasilios* and the *Aghios, Gorgios*, 20 *Rev. Gén.* p. 652. As to the attitude of the Italian government toward the Declaration, see Coquet in 21 *Rev. Gén.*, pp. 105 ff; and Rapisardi-Mirabelli, 45 *Rev. de Droit Int. Pub.*, p. 582.

neutral powers and the belligerents." The Austro-Hungarian government replied that it had instructed its naval forces to observe the stipulations of the Declaration upon condition that the enemy observed them in like manner, and the German government returned a similar reply. The Russian government replied that it was awaiting the decision of the British government and would conform its action to that of Great Britain. On August 22, the British government replied that it had given the "most careful consideration" to the American inquiry and that it had decided to "adopt generally the rules of the Declaration subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations." A detailed explanation of these modifications and additions was furnished in an accompanying memorandum. The French government replied that it would observe the Declaration subject to practically the same modifications and additions and the Russian government thereupon returned a definite answer to the same effect.

But these offers of piece-meal acceptance were exactly what the London Conference had sought to prevent by the requirement (Article 65) that the Declaration must be ratified as a whole. As such, the offers were not acceptable to the American government, and, on October 22nd, the Secretary of State instructed its diplomatic representatives to the belligerent governments to inform them that the United States government felt obliged to withdraw its suggestion that the Declaration be adopted as a "temporary code of naval warfare to be observed by belligerents and neutrals during the present war." They were further instructed to say that the American government would "insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States, irrespective of the provisions of the Declaration of London."<sup>1</sup>

<sup>1</sup> The correspondence between the United States and the various belligerent governments in regard to the matter may be found in the

In the meantime, (August 20, 1914), the British government issued an order in council putting the Declaration into force, with certain additions and modifications, "as if the same had been ratified by His Majesty." Articles 22 and 24 were modified by transferring to the list of conditional contraband various articles which were on the free list of the Declaration and by transferring to the list of absolute contraband various articles (aeroplanes, airships, balloons, etc.), which were on the list of conditional contraband in the Declaration. Thus the presumption of hostile destination in the case of conditional contraband was enlarged and the doctrine of continuous voyage was extended to the carriage of such contraband, a rule which the Declaration had expressly condemned. Article 33, relative to the destination of conditional contraband, was modified by the substitution of a rule which declared that the destination referred to in this article might be inferred from any sufficient evidence, and (in addition to the presumption laid down in Article 34) should be presumed to exist if the goods were consigned to or for an agent of the enemy state.<sup>1</sup>

Naval War College *International Law Topics*, 1915, pp. 94 ff; also in a white book issued by the Department of State, May, 1915, entitled *Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Commerce*, pp. 5-8.

<sup>1</sup> The German government addressed a protest to neutral powers against these modifications of the Declaration of London, although its own policy, notably in respect to the destruction of neutral prizes, was from the outset in violation of the rules of the Declaration. The American government refrained in its note to the British government of December 28, 1914, relative to the alterations in the Declaration, from entering upon a discussion of the propriety of adding to the list of conditional contraband articles which were not so included in the list of the Declaration, but it pointed out that such additions could not be made arbitrarily by a belligerent since it was well established that they must be in conformity with existing treaties and the generally recognized rules of international law. Clearly, the allied governments had a right to modify the rules of the Declaration so long as the changes were not contrary to the generally recognized customary rules of international law. The additions to the list of contraband made by the allied governments appear formidable enough, but in view of the military importance of the articles added (which was not foreseen in 1909) it is hardly just to say

It was further ordered that notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 32, would be liable to capture, ~~to~~ whatever port the vessel was bound and at whatever port the cargo was to be discharged. It will be recalled that one of the objections directed against the contraband clauses of the Declaration during the discussion of the subject in England, was that it permitted belligerents to do this very thing. The order also laid down certain additional presumptions regarding the knowledge of an existing blockade. Finally, it was added that the General Report of the London Conference should be considered by all prize courts as "an authoritative statement of the meaning and intention of the said Declaration and such courts shall construe and interpret the provisions of the said Declaration by the light of the commentary given therein." This order was repealed and replaced by an order in council of October 29, 1914, and other orders in council were subsequently issued from time to time, making further additions to or modifications in the Declaration. The French and Russian governments issued decrees similar to that of August 20, of the British government, and replaced or modified them from time to time so as to conform their policies to that of the British government<sup>1</sup>. Germany and Austria-Hungary, which had offered to observe

that the additions were unreasonable. The additional presumptions introduced, in respect to hostile destination, were likewise not an unreasonable application of the doctrine of continuous voyage, under modern conditions of commerce. And as to the extension of the doctrine of continuous voyage to the transportation of conditional contraband, that too, as the war proved, was necessary if a belligerent is to be allowed to prevent neutrals from transporting contraband to the enemy. At the London conference all the Allied Powers, including the United States and Italy had favored the acceptance of this principle. Compare Bentwich in 9 *Amer. Journal*, 35 ff.

<sup>1</sup> The orders in council and decrees of his British, French and Russian governments putting the Declaration as thus modified, into effect may be found in special supplements to Vols. 9 and 10 of the *Amer. Jour. of Int. Law*.

the Declaration upon condition of reciprocity, naturally felt free to make corresponding additions and alterations and this they freely did. When Italy entered the war in 1915, the Italian government, by a decree of June 3, proclaimed that it would observe the Declaration subject to practically the same modifications which her allies had introduced.<sup>1</sup>

In the meantime further modifications were made in the Declaration. In December 1914, the British government announced that it no longer proposed to observe its earlier interpretation of article 47 relative to the removal from neutral vessels of individuals embodied in the armed forces of the enemy. At the beginning of the war it had agreed not to consider article 47 as authorizing the arrest of passengers on neutral vessels, who were not yet attached to their military units but who were merely proceeding to their country in response to a call to the colors. In view, however, of the action of the German military forces in Belgium and France in removing as prisoners of war all persons liable to military service, the British government declared that in the future it would arrest, whenever possible, all enemy reservists found on board neutral ships on the high seas, no matter where they might be met. This decision was not intended to be considered as a repudiation of article 47, but merely the adoption of an interpretation which was justified mainly as a measure of reprisal. Another important modification related to article 57 which lays down the rule that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly. By a British order in council of October 25, 1915, this rule was abrogated and in lieu thereof the rule was substituted that henceforth the British prize courts should "apply the rules and principles formerly observed in such courts." Great

<sup>1</sup> Italian text in *Gazzetta Ufficiale*, June 15, 1915, No. 150; French text in Fauchille and Basdevant, *Jurisprudence Italienne en Matière de Prises Maritimes*, p. x.

Britain's allies promptly followed her action in the matter.<sup>1</sup> The particular circumstance which led to the abrogation of the rule was the discovery that ships, owned wholly or in part by persons of German nationality in the United States, were being operated under the flag of the United States, then a neutral power. Under article 57 they were protected from capture ; with article 57 out of the way the British and French prize courts would be free to apply the test of nationality, which they promptly did, and confiscated various ships flying the American flag, but which were alleged to have been owned wholly or in part by German capital.<sup>2</sup> In the case of the *Hamborn*, Sir Samuel Evans, in condemning a vessel owned by a German-directed company in the Netherlands, but which was flying the Dutch flag, declared it to be a settled rule of prize law, that prize courts will "penetrate through and beyond terms and technicalities to facts and realities," and that it is their duty to "pull off the mask and exhibit the vessel in her true character." This decision was affirmed by the Privy Council.<sup>3</sup> It must be admitted that the rule of the Declaration which made the nationality of the flag conclusive as to the character of the ship opened the door to abuses, as the events of the great war showed. As Professor Holland justly remarked in a letter to the *London Times*, the flag is conclusive only when it is an enemy flag ; if it is a neutral flag belligerents should be permitted to go behind the flag and inquire into the nationality of the owner.<sup>4</sup>

<sup>1</sup> Fauchille, *Droit Int. Pub.*, Vol. II, sec. 1388.

<sup>2</sup> See the cases of the *Hocking*, the *Genesee*, the *Kankakee* and the *Solveig*. Details in my *International Law and the World War*, Vol. I, pp. 198-200.

<sup>3</sup> *British and Colonial Prize Cases* (Ed. Trehern) Vol. 3, p. 80 A. C. 993 (1914). Compare also the case of the *Proton*, *ibid*, p. 125.

<sup>4</sup> Compare an editorial in the *London Times* of October 26, 1915, which remarks that the abrogation of Article 57 and the substitution of the test of nationality had become necessary by the experience of the war.

Lord Lansdowne declared in the House of Lords after the abrogation of article 57 that the Declaration of London was "dead as an instrument of international obligation." The finishing touch was given by a British order in council of July 7, 1916, following the decision of the Privy Council in the *Zamora* case, that the prize court was not bound by orders in council which were contrary to international law. By this order in council the original order proclaiming the Declaration (with certain additions and modifications) to be in force, was revoked and it was announced that the British government and those of its allies intended to "exercise their belligerent rights at sea in strict accordance with the law of nations." It was added that whereas, on account of the changed conditions of commerce and the diversity of practice, doubts might arise in certain matters as to the rules which His Majesty and his allies regard as being in conformity with the law of nations, it was expedient to lay down the rules that would be observed in respect to certain matters of naval warfare. The order in council then proceeded to set forth the rules that would henceforth be applied in regard to the presumption of hostile destination, continuous voyage and the liability of contraband to capture. In a communication addressed to neutral governments, the British government recited the reasons which had determined it and the allied governments to withdraw the Declaration. Among other things it declared: "At the beginning of the present war, the allied governments, in their anxiety to regulate their conduct by the principles of the law of nations, believed that in the Declaration of London they would find a suitable digest of principles and compendium of working rules. They accordingly decided to adopt the provisions of the Declaration, not as in itself possessing for them the force of law, but because it seemed to present in its main lines a statement of the rights and duties of belligerents based on the experience of previous naval wars. As the present struggle developed, acquiring a range and character beyond all previous conceptions, it became clear that the attempt

made at London in time of peace to determine, not only the principles of law but even the form under which they were to be applied, had not produced a wholly satisfactory result. As a matter of fact, these rules, while not in all respects improving the safeguards afforded to neutrals, do not provide belligerents with the most effective means of exercising their admitted rights."

"As events progressed, the Germanic powers put forth all their ingenuity to relax the pressure tightening about them and to reopen a channel for supplies; their devices compromised innocent neutral commerce and involved it in suspicions of enemy agency. Moreover, the manifold developments of naval and military science, the invention of new engines of war, the concentration by the Germanic powers of the whole body of their resources on military ends, produced conditions altogether different from those prevailing in previous naval wars."

The rules of the Declaration, it was further added, could not stand the strain imposed by the test of rapidly changing conditions and the allied governments had been forced to recognize the existence of these conditions; they must therefore, limit themselves to applying the "historic and admitted rules of the law of nations." But, it was added, they would not, without cause, interfere with neutral property and they would always be ready to consider claims and grant redress whenever it was due.<sup>1</sup>

In revoking the order putting the Declaration into effect and announcing their intention to exercise their belligerent rights at sea in strict accord with the "law of nations," the allied governments proceeded on the assumption that such of the rules of the Declaration as were replaced by the new rules proclaimed, did not, as was affirmed in the preamble of the

<sup>1</sup> Text in British White Paper, *Misc. No. 22 (1916)* cd. 8293. Regarding the attitude of England toward the Declaration, see an article in the *London Solicitor's Journal and Weekly Reporter*, for July 8, 1916, pp. 600 ff.



Declaration, correspond in substance with the generally recognized principles of international law. It was true that certain of the rules of the Declaration, particularly those which were the result of compromise and concession, were not the rules which had been universally recognized and applied.<sup>1</sup> Some of these rules have already been referred to above. It was equally true that the war had demonstrated that certain rules of the Declaration, such as those relating to contraband and the nationality of ships, were illogical and not in accord with the new conditions under which they had to be applied. But for the most part, it was true, as asserted in the preamble, that the rules of the Declaration corresponded in substance to the generally recognized principles of international law. There were some innovations and some rules which had not been universally accepted, but they were not numerous.

The abrogation by the allied governments of the Declaration did undoubtedly put an end to it, so far as it was an international instrument, but what was said of the Hague Conventions of 1907, namely that such of its rules as were already a part of the established customary law of nations were binding upon the belligerents independently of the validity of the Declaration as a whole. The essential portions of it had already been incorporated in the prize codes of Germany, Austria-Hungary, Italy and France. It may also be remarked that the rules of the Declaration in so far as they had not been modified by orders in council were applied by the British prize courts during the World War. Thus in the case of the *Katwyk* Sir Samuel Evans said he thought it would be right to act on

<sup>1</sup> In the case of the *Kim*, Sir Samuel Evans, President of the British prize court, declared that article 35, which excludes the application of the doctrine of continuous voyage to the transportation of conditional contraband, was an "innovation" in international law, and therefore the British order in council of October 19, 1914, modifying the article was not in contravention of the existing law. *British and Colonial Prize Cases*, Vol. I, p. 427. In the case of the *Hakan* (*ibid*, II, p. 210),

the principles of the Declaration, apart from its binding effect as an international convention.<sup>1</sup> In the case of the *Pontoporos*, the supreme court of the Straits Settlements declared its willingness to assume that the Declaration was binding, although it was not necessary to the decision of the question involved.<sup>2</sup> In many of the prize cases involving the application of the rules of the Declaration it was at least prior to its abrogation in July, 1916, invoked by counsel in their arguments and was generally treated both by them and by the prize courts as having a binding force notwithstanding the fact that it had never been formally ratified.<sup>3</sup> As is well known, Germany undertook to

Sir Samuel denied the accuracy of the assertion in the preamble to the Declaration regarding the conformity of its rule to the generally recognized principles of international law. He further declared that article 40, which allows condemnation of a neutral vessel only when the contraband goods amount to more than half the cargo, was also an innovation and a mitigation of the ancient rule which allowed condemnation of the vessel if it carried contraband in any proportion. But in the case of the *Axel Johnson* (*ibid*, II, 536) the prize court declared that article 30 was an accurate statement of the law of nations regarding the liability of absolute contraband to capture when destined to enemy territory. Although the Declaration had not been ratified, the court thought the attitude and action of the most important maritime states justified the prize court in applying article 40. See also an article entitled "The Legal Position of the Declaration of London," in the *Jour. of the Soc. of Comp. Leg.*, July, 1915, pp. 72 ff. by Mr. R. F. Roxburgh, who pointed out that the Declaration contained various new rules of international law. See also an article by Justice G. C. Phillimore, entitled "The Status of the Declaration of London," *ibid*, pp. 233 ff. There was much discussion by Italian jurists in 1911-12 of the question whether the rules of the Declaration conformed in substance to the existing customary law of nations. The Italian prize commission in the cases of the *Aghios Gorgios*, *Vasilios* and *Sheffield* affirmed that they did, but this view was combatted by Fedozzi, Anzilotti, Rapisardi-Mirabelli, Intrigula, and others. See also Coquet, 21 *Rev. Gén.*, 109-115. I have discussed the matter more at length in Lecture No. VI, below, where the Italian arguments are cited.

<sup>1</sup> *British and Colonial Prize Cases*, Vol. I, p. 206.

<sup>2</sup> *Ibid*, p. 384.

<sup>3</sup> See for example, the cases of the *Lorenzo* (*Brit. and Col. Prize Cases*, I, 228); *The Thor* (*ibid*, 231); the *Leda* (*ibid*, 238); the *Hanametal* (*ibid* 347). But after the abrogation of the Declaration the prize courts

justify certain of her measures of reprisal because of the non-conformity of Great Britain and France to the rules of the Declaration. In so far as there may have been non-conformity to such of its rules as were in accord with the generally recognized principles of the customary law of nations, the German complaint was well founded; naturally, however, the allied governments denied that there had been any non-conformity to such principles. Upon the outbreak of the European war the government of Chile announced that, since the rules of the Declaration corresponded in substance to the generally recognized principles of international law on the points with which they dealt, it would apply them, not as conventional law, but as principles of international law at present in force, as the Italian government had done during its war with Turkey in 1912.<sup>1</sup> In so far as its rules did not consist of innovations upon the existing customary law, the Declaration was certainly binding upon belligerents and neutrals alike, independently of the status of the Declaration as an international instrument. To say, therefore, as Lord Lansdowne and others did, that it was a "dead letter" was true only in a very limited sense.

no longer recognized the binding force of the Declaration as an international instrument. See, for example, the case of the *Hakan* decided by Sir Samuel Evans in July, 1916 (*ibid*, II, 210). The French and Italian prize councils adopted the same course. The decisions of the French prize council may be found in the collection of M. Fauchille, entitled *Jurisprudence Française en Matière de Prises Maritimes*. The decisions of the Italian prize councils may be found in a collection edited by M. Fauchille and M. Basdevant entitled *Jurisprudence Italienne en Matière de Prises Maritimes* (Paris, 1918).

<sup>1</sup> Alvarez, *La Grande Guerre Européenne et la Neutralité du Chili*, pp. 157-158.

## LECTURE IV

### Development of International Aerial Law.<sup>1</sup>

I come now to consider a part of international law which is wholly the product of the twentieth century, namely, the law governing the use of the so-called aerial domain for the purposes of commercial navigation, for the transmission of wireless telegraphic dispatches and as a theater for the conduct of hostilities.

At the outset we may distinguish between several parts or zones of the air space. In the first place, there is the upper zone which by reason of its temperature is completely closed to man. It can neither be used for purposes of navigation nor subjected to the control of the subjacent state. No state or individual has any interest in it and it may therefore be eliminated from all consideration. In the second place, there is the lower zone immediately above the earth, which may be regarded as a sort of annex or appurtenance to the soil upon which it abuts. It is within this zone that buildings are erected, telegraph and telephone wires are stretched, and in it take place many

<sup>1</sup> The literature dealing with the legal status of the air space and its use for the purposes discussed below, although quite recent, is already very extensive in quantity. The following list of books, monographs and articles are the most important contributions: Banet-Rivet, *L' Aéronautique* (1898); Catellani, *Il Diritto Aéro* (1911); Julliot, *Aéronefs Sanitaires* (1913); also his *De la Propriété du Domaine Aérien*, being a reprint from the *Revue des Idées* (1908); Loubeyre, *Les Principes du Droit Aérien* (1911); Lycklama a Nijeholt, *Air Sovereignty* (1910); Phillit, *La Guerre Aérienne* (1910); Piogey, *Des Règles de Droit International Applicables à l'Aviation* (1914); Meili, *Das Luftschiff im Internen Recht und Völkerrecht* (1908); also his *Das Draghtlose Télégraphie* (1908); Meurer, *Luftschiffahrt Recht* (1909); Spaight, *Air Craft in War*, (1914); Grahame-White and Harper, *Air Craft in the Great War*; Grünwald, *Das Luftschiff in Völker und*

of the activities of man which the state regulates or prohibits. The height of it may be said to extend to that of the tallest buildings plus the height of any telegraphic or other installations which may be erected upon them. Professor Rolland places

*Strafrechtlicher Beziehung* (1908); Schroeder, *Der Luftflug in Geschichte und Recht* (1911); Scholz, *Drachtlose Télégraphie und Neutralität* (1905); Hooghe, *Droit Aérien* (1912); Guibe, *Essai sur la Navigation Aérienne en Droit Interne et International* (1912); Meyer, *Die Erschliessung des Luftraumes in ihrem rechtlichen Folgen* (1909); Schnaelli, *Radio-Telegraphie und Völkerrecht* (1908); Fleischmann, *Grundgedanke eines Luftrecht* (1908); Blachère, *L'Air et le Droit* (1911), Kausen *Die Radio-Telegraphie im Völkerrecht* (1910), and Thurn, *Die Funkentelegraphie* (1913). Among the more important articles may be mentioned those of Baldwin entitled "Law of the Air Ship" in 4 *Amer. Jour. of Int. Law*, pp. 95-108; Kuhn, "Beginnings of Aerial Law," *ibid*, 109-133; also his article on International Aerial Navigation and the Peace Conference, *ibid*, Vol. 14, pp. 369 ff.; Lee, "Sovereignty of the Air," *ibid*, Vol. 7, pp. 470-499; also his article on the "International Flying Convention" in 33 *Harvard Law Review*, pp. 23 ff.; Hershey, "The International Law of Aerial Space," 6 *Amer. Jour.*, pp. 381 ff.; Wilson in 5 *Amer. Pol. Sci. Review*, pp. 171 ff.; Leech in *The Fortnightly Review* for August, 1912; Fauchille, *Le Domaine Aérien et le Régime Juridique des Aérostats*, 8 *Rev. Gén.* (1901), pp. 414 ff.; also his article *La Circulation Aérienne et les Droits des Etats en temps de Paix*, *ibid*, Vol. 17 (1910), pp. 55 ff.; his article *La Télégraphie sans Fil et le Droit International*, in 47 *Rev. de Droit Int. et de Lég. Comp.* (1920) pp. 7 ff., and his various reports to the Institute of International Law, *Annuaire*, Vol. 19, pp. 19 ff.; Vol. 21, pp. 76 ff.; and Vol. 25, pp. 297 ff.; Rolland, *La Télégraphie sans Fil et le Droit des Gens*, 13 *Rev. Gén.* (1906), pp. 58 ff.; and his *Les Pratiques de la Guerre Aérienne*, 23 *Rev. Gén.* (1916), pp. 407 ff.; Merignhac, *Le Domaine Aérien Privé et Public et les Droits de l'Aviation en Temps de Paix et du Guerre* 21 *Rev. Gén.* (1914), pp. 205 ff.; Boidin, *La Télégraphie Sans Fil en Temps de Guerre*, 16 *Rev. Gén.* (1909), pp. 261 ff.; Sperl, *La Navigation Aérienne au Point du Vue Juridique*, 18 *Rev. Gén.* (1911), pp. 473 ff.; Nys, *Droit et Aérostats*, 4 *Rev. de Dr. Int.* (1902), pp. 501 ff.; Grünwald in 24 *Archiv für Öffentliches Recht* (1909), pp. 190 and 477; Zitelman, in *Zeitschrift für Int. Priv. und Off. Recht*, 1910, pp. 1 ff.; Kohler, 4 *Zeitschrift für Völkerrecht und Bundestaatsrecht*, pp. 588 ff.; Phillimore, in *Pubs. of Grotius Society*, 1, 61 ff. See also various articles and reports in the *Revue Juridique Internationale de Locomotion Aérienne*. In my *International Law and the World War*, Vol. I, Ch. 19, I have discussed the interpretation and application of aerial law during the late war and have there referred to the literature. More elaborate, though incomplete bibliographies may be found in 18 *Rev. Gén.* (1911), p. 473; in Loubeyre, *op. cit.*, pp. 217-220; in 6 *Amer. Jour.*, pp. 387-388 (Hershey), and in Hyde, *op. cit.*, Vol. I, p. 325.

this height at 330 meters.<sup>1</sup> Over this zone the subjacent state has, according to the great majority of writers, a right of full and exclusive control, and a few consider that it possesses even the right of ownership;<sup>2</sup> according to some, however, it has the right of neither ownership nor sovereignty but only a limited right of control which may be exercised solely for the purposes of protection or conservation. Whatever may be the differences of opinion regarding the exact juridical nature of this right all writers are agreed that the underlying state may exercise over this zone whatever control may be necessary to the enforcement of its own laws and for the protection of the rights of the inhabitants and the defense of the interests of the state itself. This part of the aerial domain has been described by some writers as the *territorial zone*; <sup>3</sup> by others as the *national zone*, in contradistinction to the *international zone* which lies between the lower and upper areas.<sup>4</sup> Before considering this question we

<sup>1</sup> That being the height of the Eifel tower, the tallest existing structure in the world, plus the height of the installations that have been erected upon it. See his *La Télégraphie Sans Fil et le Droit des Gens* in 13 *Rev. Gén.*, p. 66. See also Fauchille, *ibid.*, Vol. 8, pp. 414 ff.

<sup>2</sup> Grünwald defends the ownership theory. The air space is so closely connected with the land upon which it rests that it may, according to him, be regarded as an appurtenance to or accessory of the land and therefore the state has over it a right of both *imperium* and *dominium*. See his *Das Luftschiff in Völkerrechtlicher und Strafrechtlicher Beziehung*, pp. 15-16. De Montmorency also appears to be a partisan of the ownership theory, *Grotius Society Pubs.* 3, 64. But this view is hardly tenable and it results from an attempt to apply a rule of private law in a case where only rules of public law are applicable. The air as such is not capable of appropriation and it is doubtful if the air space is any more so. Compare Hazeltine, *op. cit.*, p. 39; Merignhac, art. cited, p. 207; and Philit, *op. cit.*, p. 22. But Julliot, (*op. cit.*, p. 6) distinguishing between the air space as such and the air as an element, contends that the former is susceptible of ownership (*propriété*), whereas the latter is not.

<sup>3</sup> Sperl, *La Navigation Aérienne au Point de Vue Juridique*, 18 *Rev. Gén.* 477.

<sup>4</sup> Merignhac, *Le Domaine Aérien Privé et Public*, etc., 21 *Rev. Gén.* 223. Merignhac fixes the height of what he calls the "national" zone at 200 metres. The international zone begins at this point and extends upward 400 meters.

may call attention to the status of two other parts of the aerial domain, namely, the air space over the high seas and that over the marginal or territorial sea. As to the former, all writers are agreed that it is free and that no state has any right of control over it.<sup>1</sup> There is also a general agreement that as regards the air space over the territorial sea the riparian state has over it the same rights which it has over the aerial domain above its territory. According to some writers it is a right of sovereignty, according to others it is a right of protection and conservation only.

Returning now to a consideration of the status of the intermediate or international zone, the zone which is available for international navigation and the transmission of wireless correspondence, we may observe that from the outset there has been a considerable divergence of opinion regarding it and the matter has not yet been entirely settled by international agreement. As soon as the practicability of aircraft as instrumentalities of commerce, and of combat and of the air as a medium of wireless telegraphy had been demonstrated, the legal status of the aerial domain and the rights of states over it began to occupy the attention of jurists and law societies. A vast literature on the subject soon made its appearance and a great variety of theories and solutions were proposed by individual

<sup>1</sup> The view of De Montmorency appears to be an exception to this statement. The power, he says, which is "able to dominate any particular air space over the ocean is, in time of war, at liberty to do so." He bases this right on the doctrine of "effective occupation" which is now possible, as regards the sea, so he argues. See his article "The Control of Air Spaces," 3 *Grotius Society Pubs.*, 67-68. In a later article he asserts that the Great War has shown that the air space above the high seas is capable of "strategic control and effective occupation" and that such control was in fact exercised over the air space above the north sea, the Mediterranean and the Adriatic. He concludes that the air space above the high seas "is not absolutely free, since that space plays upon territorial air space, and nothing must be done that will infringe upon territorial sovereignty without the consent of the sovereign." See his article "The Problem of Air Law" in *British Year Book of International Law*, Vol. II (1921-22), p. 169.

writers and by learned societies. These opinions may be roughly classified as follows :—<sup>1</sup>

- (1) The air is, or should be, absolutely free, presumably for purposes of navigation, the dispatch of telegrams or other purposes for which it is capable of being utilized, and this without regard to differences of zones or the existence or non-existence of war. This was the view of the older writers such as Wheaton, Bluntschli, Pradier-Fodéré, Stephen, and some recent jurists like Nys.
- (2) The opposite view, that the subjacent state has an absolute right of sovereignty over the entire super-incumbent aerial domain without regard to height. Among those who have advocated this view may be mentioned Von Litz, Von Ullmann, Zitelmann, Martitz, Collard, Lycklama, Hazeltine, Spaight, Bellot and de Montmorency.<sup>2</sup>

These writers would, of course, allow innocent passage to foreign aircraft, but rather as a concession than as a right. Underlying states would be entirely free to withhold it or allow it, subject to such conditions as they might see fit to prescribe.

- (3) Between the representatives of these extreme views there are several intermediate groups of writers who admit neither the principle of the absolute freedom of the air, on the one hand, nor the absolute sovereignty

<sup>1</sup> The views of the more important jurists who have written on the subject are discussed and classified, not always correctly, by Loubeyre, *op. cit.*, pp. 139 ff.; by Lycklama, *op. cit.*, pp. 11 ff., and by Sperl, art. cited, pp. 476 ff. See also Hazeltine, *op. cit.*, Ch. 2; Merignhac, art. cited, pp. 211 ff.; Phillit, *op. cit.*, pp. 21 ff., and Lee, *Sovereignty of the Air*, in 7 *Amer. Jour.*, pp. 474 ff.

<sup>2</sup> Lycklama, *Air Sovereignty*, p. 46; Sperl, art. cited, p. 478; Zitelmann in *Zeitschrift für Internationales Privat und Öffentliches Recht*, 1909, p. 458; Litz, *Das Völkerrecht*, 6th ed., p. 78; Hazeltine, *Law of the Air*, p. 44; Spaight, *Air Craft in War*, p. 61; Bellot, *Int. Law Notes*, 3: 133; and De Montmorency, *Grotius Society, Problems of the War*, Vol. 3 (1917), pp. 61 ff.



of the subjacent state over the superincumbent aerial space, on the other.<sup>1</sup>

- (a) First, there are those who either maintain the general principle of the freedom of the air, but allow the subjacent state a certain right of control for purposes of protection and conservation, up to a certain height, or, inverting the order, maintain the right of control for purposes of conservation as the general principle, subject to the right of innocent passage. Among the exponents of this principle are Fauchille, Rolland, Merignhac, Meyer, Rivier, von Bar, Holtzendorff, Gareis, Despagnet, Oppenheim and many others.

Merignhac, as we have seen, limited the height of this zone to 200 metres; Rolland to 330 metres; Fauchille in his earlier project fixed it at 1500 metres, but later reduced it to 500 which was the height fixed by Ferber. Holtzendorff fixed it at 1000 metres while Von Bar limited it to a height of 50 or 60 metres. Other writers fix the height of the zone at the limit of the most powerful artillery range; others as high as the authority of the state can make itself felt, etc. Closely related to this group are those who allow the subjacent state a right of control for purposes of protection and conservation without restriction as to height. Among the exponents of this view are Meili, Stranz, and Catellani. This was the view expressed by the Institute of International Law at its meeting at Ghent,

<sup>1</sup> The difference between the two views is not, however, very great. Admitting the principle of freedom of the air but allowing the state the right of control up to a certain height leads practically to the same result as affirming the sovereignty of the state over the same zone, but restricting its exercise to the necessities of protection and conservation. In neither case is there entire freedom or unrestricted sovereignty. De Hooghe's and Catellani's views differ from the above in that they do not admit that the air is free but regard it as *res communis* which is subject to the common sovereignty of states.

in 1906. Article 1 of its proposed *règlement* in respect to wireless telegraphy declared: "The air is free; states have over it, in time of peace and in time of war, only the rights necessary for their preservation." Article 3 recognized the right of each state, so far as necessary for its security, to prevent above its territory and territorial waters, and "as high as need be," the passage of Hertzian waves.<sup>1</sup> This view was reaffirmed by the Institute at its Madrid meeting in 1911 when it declared that "international aerial circulation is free, saving the right of subjacent states to take certain measures, to be determined, to ensure their own security and that of the persons and property of their inhabitants."<sup>2</sup>

(b) Lastly, there is the view that the subjacent state is absolutely sovereign over the whole aerial space above its territory without regard to height, but that it is limited by the right of innocent passage by aviators of other states. Some of the exponents of this view maintain that this right of innocent passage is in effect, an international servitude, the exercise of which cannot be denied, but others apparently do not so regard it.<sup>3</sup> Perhaps the majority of recent writers adopt this general view of the rights of states over the air space. Among them may be mentioned Baldwin, Holland, Grünwald, Meurer and Westlake. This solution was that reached by an unofficial congress of jurists (mostly Italian) held at Verona in 1910 for the regulation of aerial locomotion.<sup>4</sup> In 1910

<sup>1</sup> *Annuaire de L'Institut*, Vol. 21, p. 328.

<sup>2</sup> *Ibid*, Vol. 24, p. 346. This was substantially the same conclusion reached by the third *Congrès juridique international de la Locomotion Aérienne* at Frankfort in September, 1913. Text of its resolutions in 20 *Rev. Gén.*, p. 601.

<sup>3</sup> The committee on aviation of the International Law Association at its meeting in 1913 reported in favor of the principle of the sovereignty of the underlying state subject to the condition that freedom of navigation should be allowed as a matter of "comity." *Int. Law Assoc. Report*, 1923, pp. 532-533.

<sup>4</sup> De Valles, in *Rev. Jurid. Int. de la Locom. Aérienne*, 1910, p. 175.

an international conference called by the French government was held at Paris to formulate an international convention for the regulation of aerial navigation, but on account of the divergences of view among the representatives of the powers who took part in the conference no agreement was reached. The *procès verbal* of the conference was never made public but it is known that the differences of opinion were irreconcilable.<sup>1</sup> This is also the view enunciated in the Convention relating to international air navigation, agreed to by the representatives of the allied and associated powers at the Peace conference in 1919.

We may now examine briefly these several theories regarding the juridical nature of the air space and the rights of states over it. Considering first the theory of the absolute freedom of the air it may be remarked that with the exception of M. Nys, the advocates of this theory were older jurists who wrote at a time when aerial navigation was nothing more than a dream and when the use of the air as a medium for the transmission of telegraphic correspondence had never even been thought of. The possible consequences of a regime of unlimited freedom in the use of the air space for navigation or other purposes were hardly conceived of. It may also be remarked that when these writers defended the thesis of the "freedom of the air" it is altogether probable that they were thinking of the air as an element and not of the air space as such; that is, of the air as something to breathe and not as a medium for navigation and for the transmission of telegraphic correspondence. M. Nys, however, defended the principle of unrestricted freedom in 1902 when the airship had already made its appearance and when the practicability

<sup>1</sup> See Beachère *L'Air, Voie de Communication et le Droit*, p. 129 ff.; Catellani, *Le Droit Aérien*, pp. 24 ff.; Loubeyre, *op. cit.*, p. 180, and Rolland, 20 *Rev. Gén.*, p. 703.

of both aerial navigation and wireless telegraphy had already been demonstrated. He did not limit his defense to the freedom of the air, as an element, but advocated the principle of unrestricted freedom of navigation of the aerial domain. In his report to the Institute of International Law in 1902, on M. Fauchille's *projet* respecting the *régime juridique des Aérostats* he combatted Fauchille's thesis that although as a general principle the air was free, underlying states had such rights of control over the lower zone as were necessary to their defense and conservation. M. Nys based his contention both upon the analogy of the freedom of the high seas and upon considerations of international public policy. The universally accepted principle of *mare liberum* was equally applicable, he argued, to the aerial domain, which was itself a sort of sea, though composed of a different element, and the craft which navigated it were assimilable to the ships which traverse the oceans. He maintained also that there were no substantial reasons of practical necessity or public policy for allowing subjacent states to exercise control over the air space above them and if the right were admitted it would be employed to prevent or restrict international aerial navigation to the injury of the common interests of mankind.<sup>1</sup> Neither of these arguments, however, has found favor with any other jurists who have recently written on the subject; on the contrary, they have been condemned by all writers and by international law societies and the principle of unrestricted freedom has found no recognition in the international conventions dealing with the matter. The fact is, the analogy between the aerial domain and the high seas is more apparent than real. As Meurer has aptly remarked, the air is not the sea, aircraft are not ships and a complete analogy neither exists or is desirable.<sup>2</sup> In the first place, the sea abuts upon the territory of the riparian state horizontally whereas the

<sup>1</sup> Text of his report in 19 *Annuaire de l'Institut* (1902), pp. 85-114.

<sup>2</sup> *Luftschiffartsrecht*, p. 5.

air rests upon it vertically.<sup>1</sup> The air, sustains a relation to the underlying territory such as the sea does not sustain toward the land which it washes; the air is a sort of "appurtenance" to or "accessory" of the underlying territory;<sup>2</sup> the same considerations, therefore which justify the freedom of the seas do not apply to the air space. States are not directly affected by acts resulting from the navigation of the high seas: there is no danger to the riparian state from collisions or other acts which take place on distant oceans although they may wash its coasts, whereas such acts occurring in the air space above a state affect it immediately and may prove a danger to the inhabitants below.<sup>3</sup>

It may also be remarked in this connection that even if there were a real analogy between the status of the high seas and that of the air space over the land it could hardly be invoked as an argument in favor of the freedom of the air space, because the "high" seas do not, in fact, abut upon the territory of states. That portion of the sea which washes the coast is not "high" but "territorial" and it is not free, but is admittedly subject to a certain control by the riparian state; whether we call it sovereignty or something else, makes no difference.<sup>4</sup> If the analogy of the sea therefore is to be drawn upon in support of the thesis of the freedom of the air above the land, it should be the "territorial" and not the "high" seas. But since it is admitted by all writers, without exception, that states have a right of control over this part of the sea, the very part which

<sup>1</sup> Compare Kuhn in 4 *Amer. Jour.* (1910), p. 112.

<sup>2</sup> Compare Grünwald in 24 *Archiv. fur Öffentliches. Recht*, p. 196; and Holtzendorff, *Völkerrecht*, Vol. 2, p. 230.

<sup>3</sup> Compare Westlake's remarks before the Institute of International Law in 1906, 21 *Annuaire*, pp. 297-298; Also Hazeltine, *op. cit.*, p. 34.

<sup>4</sup> There is a difference of opinion among writers as to the exact juridical character of the right which riparian states have over the marginal sea. Compare De Lapradelle, *Le Droit de l'Etat sur la Mer Territoriale*, *Rev. de Droit Int. Pub.*, 1898, pp. 264 ff. The *règlement* adopted by the Institute of International Law in 1894 described it as a right of sovereignty limited by the right of innocent passage for all ships without distinction. 20 *Annuaire*, p. 328. But if the right is so limited it can hardly be considered a right of sovereignty.

affects their interests directly, the analogy of the sea rather refutes than supports the argument in favor of the freedom of the air space above states. In fact it is more generally invoked as an argument in favor of state control over the air space above the land.<sup>1</sup> In the second place, the contention that there are no practical reasons for allowing states to exercise control over the air space above their territories cannot be admitted. A limited control, at least, is necessary not only in the interest of the national defense and self preservation, but it is necessary to prevent the violation of the criminal, revenue, immigration, health, neutrality and other laws.<sup>2</sup> Recent remarkable developments in the progress of aviation have demonstrated the increased necessity of this control. Regular lines for the international aerial transportation of passengers, mails and merchandise have been established and in two instances voyages across the Atlantic ocean have been made by airships. The extensive employment of aircraft during the World War further demonstrated the necessity of the control by neutral states of the aerial space above their territories, not only for the defense of their neutrality but also for the protection of the property and persons of their inhabitants against the falling of disabled or wrecked aircraft and the accidental dropping of bombs. Our conclusion, therefore, must be that the principle of absolute freedom of the air space cannot be recognized and it is not in fact so recognized to-day.

Turning now to the opposite extreme, that of the absolute and unrestricted sovereignty of the underlying state over the superincumbent air space, in time of peace as in time of war, and extending upward to an indefinite height, it seems hardly less defensible than the principle of unlimited freedom. Even admitting

<sup>1</sup> Compare Merignhac, art. cited, p. 208.

<sup>2</sup> Dr. Hans Sperl in 18 *Rev. Gén.* (1911), pp. 483 ff., has dwelt upon some of the important legal situations and relationships which may arise in the aerial domain and which must be regulated by the law of the subjacent state.

that by means of modern artillery states are now in a position to make fairly effective their sovereignty over the air space as far upward as it is capable of being utilized for purposes of navigation and recognizing, as we must, that for the reasons mentioned above, they should be allowed such control as is necessary to prevent violation of their laws and to protect their own interests and those of the inhabitants, it does not follow that this right should be in the nature of an exclusive and absolute sovereignty. The considerations which justify the principle of the unlimited sovereignty of the state over all persons and things within its territorial jurisdiction do not justify in law or public policy a claim to a similar sovereignty over that portion of the air space which has been referred to above as the international zone. The interests of the underlying state in this zone are far less than those over its land domain and they are also less than those in the lower or territorial air space immediately resting upon the soil. Whatever may be the rights of control the underlying state should be admitted as possessing over this part of the air space, it should not be a right of absolute sovereignty. To admit such a right would be to allow any state to prohibit at will, or impose onerous restrictions upon, the innocent passage through the air far above its own territory, of an airship voyaging from one country to another. As the air space over the high seas is free, aerial navigation between states which are so fortunate as to have sea boards could not, of course, be prevented, although by making it necessary for aviators to follow the sea routes, one of the principal advantages of aerial transportation might be sacrificed.<sup>1</sup> In the case of land-locked states such as Switzerland, Poland, Austria, Hungary, Bolivia and Paraguay, international aerial navigation even for the most innocent purposes would be entirely dependent upon the will of the states

<sup>1</sup> For example an aerial voyage by sea route from Germany to Italy.

which lie across the path of the voyage. To admit the right of any and every state thus to prohibit or restrict the passing over their territory of airships proceeding from one country to another, especially in time of peace, of ships which have no intention of landing and which expose the subjacent state to no danger except the possible falling of wrecked air planes, is certainly pushing the doctrine of sovereignty to an extreme limit. It would place it within the power of states to put an end to international aerial navigation across their territories, even when no considerations of military defense or conservation required it.<sup>1</sup> It would seem, therefore, that neither the principle of absolute freedom of the air space nor that of the unrestricted sovereignty of the underlying state offers a solution which is in conformity with the legitimate rights

<sup>1</sup> Compare Blewett Lee, 7 *Amer. Jour.* (1913), pp. 488, and 490, and 33 *Harvard Law Review*, p. 35. Those who defend the thesis of absolute sovereignty over the air invoke, first, the doctrine of the Roman law which attributed to the owner of the soil, the ownership of the air space upwards to the heavens. But as Merignhac (art. cited, p. 211) points out, this interpretation is based upon distortions of the Roman law made by the glossators. See also de Montmorency, in *Grotius Society Pubs.*, 3: 61 ff. In the second place, it is argued that this principle has already been adopted in various national civil codes, for example, the French code (art. 552), the Belgian code (art. 552), the Spanish code (art. 350), the Italian code (art. 440), the Dutch code (art. 626), the Austrian code (sec. 297), etc. But it should be remarked that the more recently adopted codes have accepted this principle under reserve. For example, the German Imperial code of 1900, arts. 904 and 905, enacts that the owner of the soil may not forbid acts or constructions above his land at a height where he has no interest in preventing them. Compare also the Swiss Civil Code, art. 667, the Portuguese Code, art. 2288, and the Civil Code of the Grisons, art. 185. Thus the maxims of the glossators have been attenuated by the condition that the owner of the soil has no right to interfere with the use of the air space above his land except in so far as he has an interest in doing so. Compare Merignhac, art. cited, p. 212: Baldwin in 4 *Amer. Jour.*, p. 98; and Hazeltine, *op. cit.*, p. 58.

Finally, it is argued that states already as a matter of fact claim and exercise the right of sovereignty, at least over the lower air space and since it is impracticable to divide the aerial domain into zones, their right to exercise full control over the whole air space without regard to height follows as a logical consequence.



of states or with the general interests of the world as they are subserved by aerial navigation. The rights of each state and the interests of all must be reconciled ; a middle ground must be found which, while leaving to each state the right to protect by suitable measures its own interests, will yet not leave it free to interfere unnecessarily with, or to prohibit entirely, the enjoyment of the great advantages which the invention of the airship and wireless telegraphy have given the world. As pointed out above, two intermediate solutions have been proposed. One affirms the general principle of the freedom of the air space, subject to the right of the underlying state to exercise such control over it, either up to a certain height or without limitation as to height, as may be necessary for its own conservation. The other inverts the order of liberty and sovereignty and affirms the general principle of the sovereignty of the underlying state over the whole superincumbent aerial space subject to the right of innocent passage. The first solution exalts the principle of liberty, the other the principle of state control ; both reject the theory of unlimited freedom and unrestricted sovereignty, although the first concedes less to state control than the latter. Each takes away with one hand a part of what it gives with the other. Either solution is preferable to the unrestricted sovereignty of the underlying state. Regarding the respective merits of the two solutions there is still a difference of opinion, the writers being pretty evenly ranged on both sides. The pioneer champion and perhaps the most distinguished advocate of the first solution was M. Fauchille, the learned editor of the *Revue Générale de Droit International Public*, who presented to the Institute of International Law at its meeting in 1902 an elaborate and carefully thought out project entitled *Régime Juridique des Aérostats*, accompanied by a report and commentary.<sup>1</sup> Already during the preceding year he had published a learned article on the subject

<sup>1</sup> Text in 19 *Annuaire de l'Institut* (1902), pp. 19 ff.

in the *Revue Générale de Droit International Public*,<sup>1</sup> in which he maintained that states have no rights of sovereignty over the air space above them because it is by its nature incapable of being appropriated or occupied or subjected to their mastery, such as the notion of sovereignty implies. Sovereignty is an *exclusive* power, it is a power of domination ; it can only be exercised over things which are completely within the control of the state exercising it ; the imperfect control which a state may exercise over the air space by means of its artillery is not sufficient to justify a claim to sovereignty, etc.<sup>2</sup> Article 7 of his *projet* therefore affirmed that "the air is free." But this was only the assertion of a general principle. Fauchille did not go to the length of contending that the air space might be utilized for any and all purposes to the injury of underlying states with no right on their part to prevent such acts. His affirmation that the "air is free" was therefore limited by the further statement : "states have over it in time of peace and in time of war only the rights necessary to their conservation. These rights relate to the prevention of espionage, customs, police, sanitary police, and the necessities of defense." Thus the principle of freedom was to be limited by the right of states to exercise such control as was necessary to prevent violations of their laws and to safeguard the national defense. But, Fauchille argued, it would lead to a very different result from that which would follow from a recognition of the sovereignty of the state over the air space even under reserve of the right of innocent passage, for in the latter case the rights of the state over the air space would be the same as over its territory, whereas, in the former case they would embrace only the right of interference for the purpose of conservation. This view of the

<sup>1</sup> Entitled *Le Domaine Aérien et le Régime des Aérostats*, Vol. 8, pp. 414 ff. See also his later article entitled *La Circulation Aérienne et les Droits des Etats en Temps de Paix* in the *Rev. Juridique Int. de la Locom. Aérienne*, Jan. 1910.

<sup>2</sup> 8 *Rév. Gén.*, pp. 417-426.

juridical nature of the air space and the rights of underlying states over it was adopted, as stated above by the Institute of International Law in 1906 and in 1911 and it has the support of many jurists. The view adopted by the Institute, however, differed in one important respect from that enunciated in Fauchille's *projet*. He and a number of other writers undertook to distinguish between two different zones of the air space; in the lower zone, the zone of "protection" or "isolation," the height of which according to Fauchille's *projet* of 1902 extended upwards to 1500 meters (but which he later reduced to 500), the state might prohibit the circulation to air craft for reasons of conservation or defense, but the upper zone was to be entirely free from control.<sup>1</sup> As stated above, there is no agreement among the advocates of the zone theory as to where the line of demarcation should be drawn, the heights proposed ranging all the way from 50 meters to 1500 meters, some adopting one test, some another. If the range of cannon shot were adopted as the criterion, the height of the zone would necessarily vary according to the power of the artillery of different countries and from time to time as the range of artillery increased. Owing also to the unevenness of the earth's surface it would vary in different parts of the same country. Whatever test is adopted the line of demarcation would be more or less arbitrary and innumerable controversies would probably result from the difficulty of determining their boundaries. For these and other reasons the zone theory has found few supporters and the projects adopted by the Institute of International Law did not embody Fauchille's proposal on this point. Nevertheless, in spite of the practical difficulties in the way, the general principle underlying the zone theory has much to commend it, for it is impossible to ignore the distinction in fact between the lower

<sup>1</sup> See articles 8-12. This *projet* and accompanying observations may be found in 19 *Annuaire*, pp. 34 ff.; see also his article in 8 *Rev. Gén.*, pp. 438 ff.

and upper zones of the air space. The actual interests of the underlying state in the air space, especially in time of peace, are almost wholly confined to the lower zone and in principle its control might logically be restricted to this area. But in view of the practical difficulties that would be encountered in delimiting the boundaries of the zones, such a restriction hardly seems feasible.<sup>1</sup>

The other solution, which recognizes the sovereignty of the subjacent state over the superincumbent air space without limitation as to height but subject to a servitude of innocent passage by aviators of other countries was advocated by Westlake at the meeting of the Institute of International Law in 1906 as a substitute for Fauchille's project. He took issue with Fauchille on the proposition that the principle of the sovereignty of the underlying state should have preference. The latter, he thought, should be the general rule and the freedom of passage the exception. The argument based on the freedom of the high seas was not logical because the sea did not bear the same relation to the land upon which it abutted as did the superincumbent air space, for it was obvious that the further one went from the coast, the less was the danger of his acts to the riparian state, whereas the higher one ascended in the air, the greater was the danger to the inhabitants below from falling objects because of their increased momentum.<sup>2</sup> Westlake, however, was able to muster only three votes for his substitute and by a large majority the Institute, as stated above, approved the principle that the air is free and that states have over it only such rights as are necessary for their conservation,<sup>3</sup> and, in 1911, it reaffirmed this opinion.<sup>4</sup>

<sup>1</sup> The zone theory is criticized by Hazeltine, *op. cit.*, pp. 32 ff. Merignhac, however (art. cited, p. 465), thinks the practical difficulties in the way of determining with precision the different zones are not serious in view of the character of the instruments now carried by aviators.

<sup>2</sup> See his remarks in 21 *Annuaire*, pp. 297-98.

<sup>3</sup> 21 *Annuaire* (1906), p. 305.

<sup>4</sup> 24 *ibid*, p. 346.

With the passing of time, however, the sovereignty theory found an increasing number of advocates. It was approved by the unofficial conference on aerial locomotion at Verona in 1910; and, while no decision was reached, it was clear that a majority of the delegates at the international conference of the powers at Paris in the same year were in favor of it.

It may be stated in this connection that the municipal legislation enacted by states, so far as there is any, is based on the sovereignty theory. Thus the British acts of 1911 and 1913 authorized a Secretary of State to prohibit from time to time, for the purpose of "protecting the public from danger" and for the purpose of the "defense or safety of the realm," the navigation of foreign aircraft over such areas as he might prescribe, which areas might include the whole or any part of the coast line of the United Kingdom and the territorial waters adjacent thereto. Aircraft flying over such areas in violation of the conditions prescribed might be fired upon.<sup>1</sup> In pursuance of the authority thus granted, the Home Secretary, in March, 1913, issued an order prohibiting foreign military or naval aircraft from passing over any portion of the United Kingdom or its territorial waters except "on invitation and by permission of the government." Other foreign aircraft were required to obtain clearance papers from British consuls and to land at certain designated places. By an act of parliament passed in 1920 all former acts were repealed and replaced by a new law which constitutes the "air charter" of Great Britain. This act affirms the "full and absolute sovereignty and rightful jurisdiction" of His Majesty over the superincumbent air space above his dominions and territorial waters. Similar legislation has been enacted by other states.<sup>2</sup> The decisions of municipal courts have also uniformly sustained

<sup>1</sup> Text of the acts of 1911 and 1913 in Spaight, *op. cit.*, pp. 154-57. As to the act of 1920 see Latey in VII, *Grot. Soc. Transactions*, p. 78.

<sup>2</sup> Compare the Connecticut statute of 1911 as amended in 1918 and the Massachusetts act of 1913; the North Carolina act of 1917, and the French decree of 1913 which prohibits any foreign aircraft from flying

the principle of state sovereignty over the aerial space above.<sup>1</sup> Finally, as already stated above, that principle of state sovereignty was that which was embodied in the International Air Convention agreed to by the representatives of the allied and associated powers at the peace conference at Paris in 1919. By article 1 of the convention, the contracting states "recognize that every state has complete and exclusive sovereignty in the air space above its territory and territorial waters." But by article 2, each contracting state undertakes in time of peace to accord freedom of innocent passage above its territory and territorial waters "provided that the conditions established in this convention are observed." It will be noted that the undertaking to grant freedom of passage applies only during peace times. Indeed, it is expressly declared in article 39 that in case of war the provisions of the convention do not affect the freedom of action of the contracting states either as belligerents or as neutrals.<sup>2</sup> The five principal allied and associated powers and twenty-two other allied powers were named as parties, but only fifteen of them signed it and it does not appear that any of them have yet ratified the convention. It cannot, therefore, be regarded as international law, but its declaration in regard to the juridical status of the air space and the rights of states over it may be taken as representing the official view of the majority of the powers. The convention regulates in great detail almost every

over French territory without a permit. Text of the latter in Piogey, *op. cit.*, p. 101. As to the more recent legislation see Clunet, 1922, pp. 848 ff.

<sup>1</sup> See the review in Hazeltine, Lecture II; Merignhac, 21 *Rev. Gén.*, 212 ff.; and Lycklama, *op. cit.*, p. 33.

<sup>2</sup> By article 3, each contracting state has the right for military reasons or in the interest of the public safety to prohibit the aircraft of other states from flying over certain areas of its territory. But no distinction can be made in this respect between domestic and foreign private aircraft. By article 15, aircraft of contracting states are allowed to cross another state without landing, but they must follow the route fixed by the state over which the flight takes place.

aspect of the matter of aerial navigation,<sup>1</sup> it bears evidence of having been framed by experts and of having been carefully thought out. There are still some, however, who think that in proclaiming the principle of "complete and exclusive sovereignty" of states over the air space above them, it concedes too much to state control at the expense of freedom of navigation. As it stands, any and every state is left free to prohibit international aerial navigation over its territory for such reasons as it may deem sufficient and if it grants the right of passage it may prescribe the routes to be followed. Land-locked states therefore, may be deprived of all access to other states through the air, at the whim of their neighbors. Moreover, states which are not members of the League of Nations were not allowed to adhere to the convention before January 1, 1923, except by a unanimous

<sup>1</sup> It contains detailed rules in 51 articles relative to the nationality of aircraft, certificates and licenses, conditions of landing, the carriage of explosives, arms, munitions and photographic apparatus, the status of public and private aircraft, etc. Besides, there are various annexes relative to the marking of aircraft, certificates of air worthiness, log books, signals, pilots, maps, reports, etc.

The rule for determining the nationality of aircraft is that applicable to sea-going ships, that is, their nationality is that of the state under whose laws they are registered. The rule of maritime law, however, is departed from by article 5, which forbids any contracting state from permitting (except by a special and temporary authorization) the flight above its territory of any aircraft which does not possess the nationality of a contracting state—this not for the purpose of coercing any state to ratify the convention but because the right of free passage which the convention promises is dependent upon the observance of the conditions which it prescribes and upon the control which such observance affords. Compare Kuhn in 14 *Amer. Jour.*, p. 373. Chapter 8 of the convention provides for the creation of an international commission for air navigation which is to be a part of the organization of the League of Nations and which is charged with various duties in connection with the execution of the provisions of the convention.

The text of the convention with the accompanying annexes, in French and English was issued by the British air ministry in 1919 (Cmd 266). Useful analyses on the convention with appropriate comment may be found in Oppenheim, *International Law* (3rd ed.), Vol. I, pp. 355-359; in Kuhn's article cited above; and in Blewett Lee's article on "The International Flying Convention," in 33 *Harvard Law Review*, 23 ff.

vote of the signatory and adhering powers and after that date only by an affirmative vote comprising at least three-fourths of the total possible votes of the signatory and adhering states. States, therefore, which are unable to adhere to the convention under these conditions are not to be allowed the right of passage over the territory of the contracting states, except by a special and temporary authorization.<sup>1</sup>

Considering now the regulation of international aerial navigation by means of bilateral conventions between states, we find that the agreements entered into, both before and since 1919, have been based on the principle that the subjacent state has over the air space above it a pretty complete right of control, limited only by the liberty of innocent passage. The first agreement of this kind was the Franco-German Accord of July 26, 1913, following the incident of the landing in France of two German aviators.<sup>2</sup> It distinguished between military aircraft or

<sup>1</sup> This and other provisions of the convention are criticized by Blewett Lee in his article referred to on the preceding page. Among other things he says: "Whatever reduces by prohibition the sum of human rights everywhere is worthy of consideration. Nothing that touches the universal life of humanity is unimportant. If, as every one hopes and believes, commercial aviation will be an important factor in the future life of nations, states excluded from the Convention have here a very serious ground for objection and may fairly claim that they are denied the common rights of mankind. Just when a relief had at last been found by human ingenuity for the isolation of the last communities, and a way had opened to the remotest spots of the earth, here is a treaty which undertakes to deny the relief and to close the way, except to signatory nations. Switzerland should have of common right commercial access to the sea and to States not adjacent by air, and not be dependent for it upon the consent of other nations. The notion that the adjacent surrounding countries may forbid entirely the innocent passage of Swiss commercial aircraft cannot fairly be based upon the idea that this result is requisite for the safety of these countries, for everybody knows better. Nations not parties to the convention ought to seek admission to it, and if denied, they are entitled to feel that their citizens have less rights than other men and are not denied a substantial part of human freedom."

<sup>2</sup> The "accord" was not a convention, but an exchange of notes between M. Jules Cambon, French ambassador at Berlin and Herr von Jagow, German Secretary of State for foreign affairs. A history and analysis of the "accord" including the text of the notes are given by



other air craft carrying officers and soldiers in uniform, on the one hand, and non-military aircraft, on the other. Aircraft belonging to the first category coming from one country to the other was not to be permitted to circulate above the territory of the latter or to land except upon the "invitation" of the government or except in case of necessity, and in the latter case certain prescribed rules regarding landing were to be observed. The circulation and landing of non-military aircraft was permitted except in prohibited areas determined by the laws and regulations of each country. Each party was left entire freedom in fixing the extent and limits of these areas.<sup>1</sup> But in order to avail of the liberty thus offered, visiting aircraft were required to carry licenses issued by the proper authorities, to bear distinctive marks of identification, to have a pilot whose proficiency was certified to by the proper authority and who was in possession of a certificate of nationality, and a passport from the diplomatic or consular representative of the state over which the voyage was undertaken. Finally, aircraft availing of this liberty must submit to all "the requirements of international law, the customs regulations and the aeronautical regulations" in force in the country over which the voyage was undertaken. It is clear from these conditions that the Franco-German accord was not based on the principle of freedom of navigation and of entry but upon the principle that the underlying state may prohibit or restrict aerial navigation over its territory as well as the landing of aircraft on its soil.

Since the signing of the International Air Convention at Paris in 1919, a number of bilateral conventions have been

Rolland in an article entitled *L'Accord Franco-Allemand du 26 Juillet 1913 Relatif à la Navigation Aérienne*, in 20 *Rev. Gén.* (1913), pp. 697 ff. An abridgment in English of the "accord" may be found in Spaight, *op. cit.*, pp. 166 ff.

<sup>1</sup> Shortly thereafter both governments issued decrees designating very extensive areas in which the circulation of the air craft of the other was forbidden and which prescribed minutely the routes of entry. Texts in 20 *Rev. Gén.* (1913), Documents.

cluded between various states for the regulation of aerial navigation between them. Among these may be mentioned those between Switzerland and France, of December 9, 1919;<sup>1</sup> between Great Britain and Denmark, of December 23, 1920;<sup>2</sup> between Great Britain and Sweden, of February 16, 1921;<sup>3</sup> and between Great Britain and France, of October 20, 1920.<sup>4</sup> These conventions are very similar in respect to the freedom of navigation which they allow and the conditions which they lay down regarding its exercise, all of them being based upon the International Air Convention signed at Paris on October 13, 1919.<sup>5</sup> They apply only to private and commercial aircraft duly registered according to the laws of their respective countries and not to military aircraft.<sup>6</sup> Each contracting party agrees to grant to such aircraft in time of peace, and on the basis of reciprocity, freedom of innocent passage over its territory and territorial waters provided the conditions laid down in the Convention are observed. Each, however, reserves the right, for military reasons or in the interest of the public safety, to prohibit flying above certain areas of its territory, subject to the condition that no distinction shall be made in this respect between the private aircraft of the two parties. The Anglo-Swedish and the Anglo-Danish Conventions, reserve to the national aircraft of each party the carriage of persons and goods for hire between two points within its own territory. All of them designate the points on the frontier at which visiting aircraft must cross, the places where they must land and the places from which they

<sup>1</sup> Text in Treaty Series of the League of Nations, Vol. I, No. 1, pp. 30 ff.

<sup>2</sup> Text *ibid*, Vol. II, No. 3, pp. 250 ff.

<sup>3</sup> *Ibid*, Vol. III, No. 3, pp. 234 ff.

<sup>4</sup> *Ibid*, Vol. II, No. 4, pp. 324 ff.

<sup>5</sup> It is provided in the Anglo-French Convention that it shall cease to apply as soon as the International Air Convention shall come into force; the others allow the right of denunciation upon three months' notice or upon the signing by both parties of the International Air Convention.

<sup>6</sup> All provide that no flight of military aircraft from one country to the other shall be allowed except by special authorization.

must depart.<sup>1</sup> The conditions which all of them lay down in regard to certificates of registration and of air-worthiness, certificates of competency for pilots, log books, identification papers and passports, distinctive marks, the transportation of passengers, mail and merchandise, distress signals, the carrying of wireless apparatus, the dropping of ballast, etc., are substantially the same as those prescribed by the International Air Convention.

Finally, all contain a provision to the effect that every aircraft and its crew shall be subject to all the obligations of the common law or general legislation, customs and fiscal legislation, laws relating to the public safety and all regulations relating to aerial navigation in force in the state in which visiting aircraft happen to be.

When we turn to a consideration of the rules of international law relative to the status of the aerial domain in time of war and the rights which belligerents and neutrals have over it, we find that as yet there are few conventional rules of any importance dealing with the matter. In the main, the law consists of principles developed by the jurists and drawn by inference from analogous rules and practices in land or maritime war.<sup>2</sup> All jurists and writers on international law, however divergent their opinions regarding the rights of states over the air space above them in time of peace, are in agreement in holding that in time of war those rights are larger than in time

<sup>1</sup> Except the Franco-Swiss Convention, which provides that these places shall be subsequently fixed by common agreement.

<sup>2</sup> Compare Hershey in 6 *Amer. Jour.*, p. 384. Some writers maintain that there should be a distinct and separate body of law governing the conduct of aerial warfare; others contend that aerial warfare should be assimilated to maritime warfare and the rules of the latter applied to the conduct of the former; others still, hold that aerial warfare is a sort of accessory either to land warfare or maritime warfare and that the rules governing the conduct of the one or the other should be applied to the former. Merignhac defends the third of these views, 21 *Rev. Gén.*, p. 230.

of peace.<sup>1</sup> This principle is recognized by the International Air Convention of 1919 (art. 39) and by the various bilateral conventions that have been concluded between states before and since. In all of them it is expressly declared that the freedom of navigation which they promise is limited to peace times and the inference which may be drawn is that in time of war states reserve full control over the air space above them. This principle therefore seems to be definitely established and recognized.

Considering first the few conventional rules that have been agreed upon, it may be remarked that they were formulated at a time when balloons were the only craft capable of being utilized in the air space and their use was limited mainly to making observations and carrying dispatches. The development of aircraft capable of navigation was still in its infancy and there had been no instances in which such craft had been employed in war. In fact their capacity for navigation had hardly been demonstrated. When the first Hague Conference assembled, the recent progress of aeronautical science justified the expectation that in the wars of the future, balloons would not only be employed for purposes of signalling, transmission of dispatches, means of escape from besieged places, etc.,<sup>2</sup> but would be utilized for the dropping of bombs and torpedoes.<sup>3</sup> It also seemed likely that other more effective types of aircraft might be perfected at an early date. The Conference accordingly

<sup>1</sup> Even Fauchille, who has been the most vigorous defender of the principle of the freedom of the air, limited only by the right of conservation, readily admits that in time of war states have full control over the air space above them and that belligerents may prohibit the circulation of aircraft therein up to a certain height in order to prevent espionage, and that neutral states may prohibit hostilities in the entire air space above them, in the interest of their own safety, 8 *Rev. Gén.*, pp. 447, 453.

<sup>2</sup> As to the use of balloons in earlier wars, see Philit, *La Guerre Aérienne*, pp. 16-17; Banet-Rivet, *op. cit.*, Ch. 2; Nys, in *Rev. de Droit Int. Pub.* (1902), p. 501; Rolland, in *Rev. Gén.*, 1916, and Garner, *op. cit.*, Vol. I, p. 458.

occupied itself with the question of the regulation of this new mode of warfare, and, as is well known, adopted a Declaration forbidding for a period of five years the launching of projectiles and explosives from balloons or *by other new methods of a similar nature*. During the interval between the first and second conferences, the progress of aerial navigation was noteworthy and the second conference renewed the Declaration of 1899 (which had expired in 1904) and prolonged its duration to the close of the third conference, which, it was assumed, would be assembled at a date corresponding to the interval between the first two. But it was significant that only twenty-seven of the forty-four states represented at the conference signed the renewed Declaration, among those refusing or abstaining being many which had signed the Declaration of 1899.<sup>1</sup> It was evident that many states which had signed the Declaration of 1899 were now unwilling to surrender the advantages of a mode of warfare the possibilities of which had become reasonably certain.<sup>2</sup> Since the third conference has never been called the Declaration is still in force, but in view of the fact that it has not been ratified by a large number of states, including most of the great powers, the prohibition cannot be regarded as a rule of international law and it has not been so regarded during the wars that have occurred since 1907.

The only existing important conventional rule relative to the conduct of aerial warfare is Article 25 of the Hague

<sup>1</sup> Among the non-signatories were Germany, France, Italy, Russia, Japan and Spain. Hardly more than a dozen states have ratified the Declaration.

<sup>2</sup> On the other hand it may be remarked that Great Britain which had been the only great power to sign the Declaration of 1899 proposed its renewal in 1907 and was one of the few great powers to sign it. Apparently it had become evident to the English that the injury to which they were more likely to be exposed from this mode of warfare would be greater than the military advantage which they would derive from resorting to it themselves, a fear which was in large measure confirmed by the events of the World War. The United States was the only other great power which ratified the renewed Declaration of 1907.

Regulations of 1907, respecting the laws and customs of war on land which declares that "the attack or bombardment, *by any means whatever*, of towns, villages, habitations or buildings which are not defended is forbidden." The italicized words were added to the corresponding article of the convention of 1899 upon the motion of the French delegation for the purpose of prohibiting bombardments by aircraft as well as by land batteries, of undefended places.<sup>1</sup> Unlike the Declaration regarding bomb-dropping its duration was not limited and it is therefore still binding upon the powers which ratified it, provided all the belligerents are parties. Since five of the belligerents during the World War (Bulgaria, Italy, Servia, Montenegro and Turkey) had never ratified it, it was technically not binding upon any of them. Nevertheless, if, as has been argued, the prohibition was merely declaratory of a pre-existing customary rule of international law, and not a new rule, it was in fact binding independently of the status of the convention as a whole.<sup>2</sup> While the purpose of the article is clearly to prohibit the bombardment of *undefended* places by aircraft as by other means, it lays down no rule for determining when a place is "defended" or "undefended," as against bombardment from the air. In land and naval war a place is defended when it possesses ramparts or fortifications, or is occupied by troops or possesses artillery for defense. But can it be said that a place is "defended" in the sense that is liable to bombardment from the air, merely because it contains fortifications, troops and ordinary artillery of horizontal range? It is doubtful. It would seem that a place can justly be regarded as "defended" against aerial bombardment only when it is equipped with artillery especially constructed for the purpose of

<sup>1</sup> *La Seconde Conference Int. de la Paix, Actes et Docs.* I, III, p. 16; Lémonon, *op. cit.*, p. 386; and Merignhac, 21 *Rev. Gén.*, p. 226.

<sup>2</sup> So argue Fauchille, 22 *Rev. Gén.*, p. 403; Rolland, 23 *ibid.*, 509 and Pillet, 23 *ibid.*, p. 21.

bringing down enemy aircraft.<sup>1</sup> If it is supplied with such artillery, it would seem to be liable to bombardment from the air even though it is not fortified or otherwise "defended" in the sense of land and naval warfare. Discussion of the question had already begun before the outbreak of the World War when aircraft were first used on a large scale for purposes of bombing. In April, 1914, Colonel Jackson, of the British Royal Corps of Engineers, in an address at London, asserted that cities like London which contained military stores, barracks, wireless installations and the like, were liable to bombardment by aircraft. In case an enemy aviator should fly over London, he said, and announce his intention of dropping bombs and the authorities should say "we are not liable to be bombarded because we are not defended," he might logically reply, "Then you must surrender."<sup>2</sup> Clearly the Hague Regulation forbids the bombardment of "undefended" towns and cities, but does it forbid the bombardment of military works, supply depots and the like in such places? So far as land warfare is concerned the American and British war manuals lay down the rule that the presence of military depots, railway establishments and the like in a town do not in themselves give it the character of a defended place.<sup>3</sup>

But Article 2 of the Hague Convention of 1907 relative to naval bombardments allows the bombardment of military works, military and naval establishments, military depots, workshops, etc., in "undefended" ports, towns and places. By analogy

<sup>1</sup> Compare Hazeltine, *op. cit.*, p. 123, and Fauchille, *Le Bombardement Aérien*, in 24 *Rev. Gén.*, p. 73.

<sup>2</sup> Spaight, *Aircraft in War*, p. 12. Sir Thomas Barclay in the *English Review* for May, 1915, expressed the opinion that the military and naval works of London, wireless installations and even the railway stations were liable to aerial bombardment. Professor Montmorency in *VII Grot. Soc. Transactions* (p. 111) also defends the German attacks in London by aeroplane and airship as a "justifiable method of warfare" since the "admitted object of war is to bring resistance to an end by strokes aimed at the vulnerable points in the opposing force."

<sup>3</sup> American rules, Art. 212, N. 1; British Manual, Art. 118.

therefore it may be concluded that such objects may be equally bombarded by aircraft.<sup>1</sup> And this view of the matter was adopted by aviators during the World War. But clearly this interpretation of the right of bombardment in the case of "undefended" towns does not allow the destruction of the entire town, as is permissible in case it is "defended." As Fauchille points out, the purpose of aerial bombardment is not the same as that of bombardment by land or sea. In the latter case the purpose is not so much to destroy the place as to compel it to surrender, whereas the object of aerial bombardment can only be to destroy, since an aviator cannot capture and occupy a city or town. But because he cannot do this gives him no more right to destroy private property or kill non-combatants than a military or naval commander has. Fauchille proposes the following rule to govern such cases: "it is permitted to bombard from the air only military or naval works, establishments, munitions depots, shops, installations and the like, in all places, whether they are fortified, defended, or occupied by troops or not. Non-combatants, private property and public property not used for governmental or military purposes or which do not subserve a strategic end should, so far as possible, be spared."<sup>2</sup> This view is generally approved; it is sanctioned by various proposed codes and it conforms to the recognized distinction between the rights of combatants and non-combatants as well

<sup>1</sup> This is the opinion of Spaight who maintains that all such objects in the city of London and in any "undefended" town are subject to bombardment by aircraft. "It seems to me," he says, "that a belligerent would be justified in interpreting "undefended" in the Hague rules as meaning not occupied by troops or otherwise in a position to offer armed resistance and that such a city as London cannot rely for immunity against attack on article 25 of the land war reglement or the corresponding article of the convention on naval bombardment." *Air Craft in War*, pp. 16, 20.

<sup>2</sup> *Le Bombardement Aérien*, 24 *Rev. Gén.*, p. 73. This is in substance the rule of the French Manual of Land Warfare (Art. 63). Professor George G. Wilson in his proposed code of aerial warfare (*Naval War College, Int. Law Situations*, 1920, Art. 28) would also allow the bombardment of such establishments in "undefended" towns and cities.



as respect for private property. But is it practicable? It is difficult for an aviator at great height to distinguish between such persons and objects which may be legitimately bombarded and those which may not be, as the history of aerial operations during the World War abundantly demonstrated. No rule except that of absolute prohibition is likely to be sufficient to protect innocent persons and property against destruction from this method of warfare. Jurists who would go to this extreme length are by no means lacking.<sup>1</sup> The question was discussed at length by members of the Institute of International Law at its Madrid meeting in 1911 and the view was there expressed by a number of distinguished jurists that the employment of aircraft for the purpose of launching bombs and projectiles should be prohibited and their use confined to such operations as the making of observations, transmission of dispatches, signalling, and the like. Among those who expressed this opinion were von Bar,<sup>2</sup> Alberic Rolin, Fiore, Holland, Labra, Strisower and Westlake.<sup>3</sup> For the most part, their objections were based upon the impossibility of employing aircraft for purposes of bombardment without exposing the lives of non-combatants and private property to the danger of destruction; that in the present state of development of aerial navigation it is impossible for aviators who attack towns and cities to restrict their operations to legitimate objects of attack and that the introduction of aircraft for the general purposes of combat would provoke rivalry between states

<sup>1</sup> For example, Mallet, *La Conquête de l'Air et la Paix Universelle* (1910), pp. 51 ff., and de Staal-Holstein, *La Règlementation de la Guerre des Airs* (1911).

<sup>2</sup> Von Bar's counter project (Art. 1) prohibited the use of airships, balloons or aeroplanes as means of destruction. He made some reservations, however, as where they were fired upon by batteries from the land or guns from ships, and he allowed aerial engagements in the air space above the territory or territorial waters of belligerents, 24 *Annuaire de l'Institut*, p. 132.

<sup>3</sup> Their views may be found in 24 *Annuaire de l'Institut* (1911) pp. 134-155. See also Merignhac, 21 *Rev. Gén.*, 225.

and lead to enormous expenditures for the construction of aerial fleets. Professor von Bar pointed out that airships, if employed for the launching of bombs and projectiles, were likely to cause more injury to non-combatants and private property than the military results would justify, because they could not be directed with precision against legitimate objects of attack. Consequently, their employment for such purposes should be renounced and their use restricted to exploration, signalling, transmission of dispatches and other non-destructive operations.<sup>1</sup> Professor Holland was so strongly opposed to such methods of warfare that he even expressed regret that the progress of science had made aerial navigation possible.<sup>2</sup> M. Lapradelle, like von Bar, was willing to admit the legitimacy of fighting between opposing aircraft over their own territory, but he too was against the dropping of bombs upon towns and cities, for the reason that it could not be done without exposing peaceful and innocent inhabitants to danger.<sup>3</sup>

On the other hand, Fauchille, Kaufmann, Meili, Renault Edouard Rolin, Clunet, Errera, de Boeck and Politis defended the legitimacy of aerial warfare. In general, they maintained that it had not been demonstrated that aircraft could not be employed for purposes of combat without exposing the peaceful population to danger, that aircraft as instrumentalities of combat were no more objectionable than submarine mines, torpedoes, submarine destroyers and other agencies of destruction, the legitimacy of which was recognized, etc. But they too, made reserves and admitted that aircraft should be employed only on the condition that its use should not authorize acts which were forbidden in land warfare.<sup>4</sup> This latter view was adopted by the Institute, which rejected a motion by Holland prohibiting the employment of aircraft for any and all purposes in war and also

<sup>1</sup> 24 *Annuaire*, pp. 127-130.

<sup>2</sup> *Ibid*, p. 137.

<sup>3</sup> *Ibid*, p. 339.

<sup>4</sup> See Fauchille's Summary, *ibid*, p. 55.

a motion by Westlake prohibiting their employment except for purposes of observation, exploration, communication and the like. It then adopted a resolution recognizing the legitimacy of aerial warfare on condition that it did not expose the persons and property of peaceful inhabitants to greater danger than that to which they were exposed in land or naval warfare.<sup>1</sup> This solution may be criticized on the ground of the generality and vagueness of the language in which it is phrased. The history of aerial warfare since the meeting of the Institute in 1911 abundantly establishes the facts upon which its adversaries based their arguments. As is well known, the first war in which aircraft were employed was that between Italy and Turkey in 1911-12. Aeroplanes and dirigibles were used by the Italians not only for purposes of observation, exploration, signalling and the distribution of proclamations, but also for the dropping of bombs upon Arab villages and camps.<sup>2</sup> The Turkish government protested, not against the employment of aircraft as instruments of combat, but against the launching of bombs and projectiles upon undefended places, upon non-combatant populations and upon hospitals and sanitary establishments, all of which acts they properly denounced as violations of the laws of war.<sup>3</sup> These very first instances of the employment of aircraft for purposes of bombardment demonstrated the practical impossibility of confining their use to legitimate objects of

<sup>1</sup> *Ibid*, p. 346. Clunet thinks the rule adopted was merely declaratory of the existing customary law of nations (43 *Jour. de Droit Int. Privé*, p. 386), but as Rolland remarks that there was no customary law on the subject in 1911 because there had been no practice (art. cited, p. 505, N. 7).

<sup>2</sup> As to the details relative to the employment of aircraft during the Turco-Italian War, see Coquet, 20 *Rev. Gén.*, pp. 534-537; the *Revue Juridique Internationale de la Locomotion Aérienne*, 1911, pp. 325 ff.; and Rapisardi-Mirabelli in 15 *Rev. de Droit Int. et de Lég. Comp.* (1913), pp. 565 ff.

<sup>3</sup> See the Turkish protest in 19 *Rev. Gén.*, p. 411, N. 2, and 20 *ibid*, p. 530, N. 7.

attack and at the same time they showed the inevitable dangers of abuse on the part of aviators.

Whatever doubt may have existed at the time in regard to the matter was removed by the events of the World War when aircraft were used on a large scale by all the principal belligerents.<sup>1</sup> Their operations were not confined to attacks upon the air and military forces of the enemy in the area which constituted the theater of hostilities but included also "raids" far beyond the lines, in the course of which bombs were dropped, often without discrimination, upon defended and undefended towns alike and upon non-combatant populations and private property. Many such "raids" were made by German aviators over England and regions of France and Italy, which were far removed from the actual theater of hostilities.<sup>2</sup> The lives of thousands of non-combatants, including women and children, and many private houses, historic monuments, schools, asylums, orphanages and hospitals were destroyed. Usually the aviators who made these "raids" claimed that the towns which they attacked were "defended," but in fact little distinction was made between "defended" and "undefended" places, and in any case, the distinction, so far as bomb-dropping from the air is concerned, has little practical basis. Where the place attacked was admitted to be "undefended" the aviators always alleged that they had endeavored to direct their bombs only against legitimate

<sup>1</sup> During the Balkan Wars of 1912-13, the Bulgarians and Servians employed aircraft for military purposes though not on a large scale. See Immanuel, *La Guerre des Balkans* (Paris, 1913), Vol. I, pp. 58, 70. A Bulgarian aeroplane flew over the city of Adrianople and dropped notices informing the inhabitants of the uselessness of further resistance and advising them to surrender. Cirilli, *Journal du Siège d'Adrianople*, p. 56.

<sup>2</sup> In the later years of the war British and French aviators by way of reprisal made similar "raids" over Germany. Details in my *Int. Law and the World War*, Vol. I, pp. 488 ff. But there was considerable sentiment in England, especially against recourse to reprisals of this kind.

objects of attack.<sup>1</sup> But this was of course, impossible, all the more so because many of the "raids" were made during the darkness of night, and when made in daytime, the aviators kept at so great a height in order to avoid the consequences of attack from anti-aircraft guns below that they could not distinguish between objects which might lawfully be bombarded and those which could not be. Under such circumstances these aerial raids were nothing less than indiscriminate attacks upon peaceful non-combatant populations, private property and civil institutions which according to the most elementary rules of civilized warfare are immune from destruction. The actual military damage done was relatively slight and rarely in proportion to the injury inflicted upon the non-combatant population, upon private property and upon educational, philanthropic and other public institutions.<sup>2</sup> Only in exceptional cases were fortifications, military works, supply depots and other legitimate objects of attack, destroyed or injured. The dominant purpose of these "raids" was psychological; the terrorization of the inhabitants in the hope of inducing them to beg for peace.

If the long recognized distinction between the status of combatants and non-combatants and between enemy property which may be destroyed and that which is immune, is to be preserved, such methods of warfare will have to be proscribed. It is quite useless to draw a distinction between places which are "defended" and those which are "undefended" and between persons and things in cities and towns against which bombs from aircraft may be launched and those which may not be attacked. As pointed out above, the distinction

<sup>1</sup> For details concerning aerial operations during the World War, see my *Int. Law and the World War*, Vol. I, Ch. 19; Merignhac and Lémonon, *Droit des Gens et la Guerre de 1914-1918*; Vol. I, pp. 649 ff. Rolland in 23 *Rev. Gén.* (1916); and Clunet in 45 *Journal de Droit Int.*, pp. 620 ff.

<sup>2</sup> The London *Times* of June 2, 1916, summed up the results of 44 German air "raids" over England. They were: 409 persons killed, 1,005 injured, all non-combatants. Of those killed 187 were women and children. No military damage of any consequence was done.

between "defended" and "undefended" places so far as aerial warfare is concerned, has no logical basis. So long, therefore, as it is permitted to launch bombs and projectiles from the air upon the cities, persons or objects in the one category, those in the other will be exposed to the same danger of destruction. It is practically certain that no rule but that of prohibition will meet the situation.<sup>1</sup>

Professor Spaight who has given much consideration to the subject, expresses the opinion, that, however much jurists may argue against the use of aircraft in war, its prohibition "appears nothing more nor less than a beautiful dream."<sup>2</sup> This I readily admit. The airship, like the submarine torpedo boat, is a perfectly legitimate instrument of destruction so long as it is employed in conformity with the principles of humanity and the laws of civilized warfare. It is not the use of either instrument, but its abuse which is condemnable.

Nor is it necessary to go to the length which some of the jurists proposed at the 1911 meeting of the Institute of International Law and restrict the use of aircraft to scouting, signalling and similar activities. They may be employed with equal legitimacy as instruments of combat and destruction. The right of a belligerent to attack by means of his aircraft the air forces of his adversary over the territory of the one or the other, to drop bombs upon his naval vessels, his armed forces, his camps and his depots, arsenals, workshops, hangars and the like, provided the latter are so situated that they may be attacked without destroying private property and the lives

<sup>1</sup> Professor De Montmorency however (VII *Grot. Soc. Transactions*, pp. 109 ff.) who justified the air raids against London as a legitimate method of warfare predicts that the wars of the future will be conducted largely in the air and that the attacks will be aimed not so much at the destruction of armies or fleets, as against the main centers of industrial production which are the economic nerve centers of a nation. The distinction between the civil and armed populations, already undermined will practically disappear.

<sup>2</sup> *Air Craft in War*, p. 3.

of non-combatants, every one will admit. It is one thing for an aviator to fly over the field of operations and launch bombs and projectiles upon the armed forces or military works and establishments of his enemy; it is another and very different thing for him to fly far beyond the lines into a part of the enemy country which is not the theater of war and in the darkness of night drop powerful bombs upon the dwellings of innocent and peaceful non-combatants, and upon school houses, churches, asylums, hospitals and similar institutions, where there may not be a soldier, a battery or military establishment of any kind in the place. It is sometimes argued that the character of the late war demonstrated the futility of the distinction between combatants and non-combatants; that under modern conditions the distinction has broken down and that in effect the whole population may be regarded as combatants. In a limited sense this is quite true. In respect to traffic in contraband and some other matters the distinction has lost much of its former significance but it does not follow from this that the distinction has disappeared in the sense that old men, women, and children who remain peaceably at home may be attacked equally with soldiers in the field. This distinction is fundamental; it is founded upon considerations of humanity and cannot be broken down by the invention of new and more powerful instruments of destruction. Whatever solution is reached, the rights of combatants in the air must be reconciled with those of non-combatants who remain at home and take no direct part in the war; the latter can no more be sacrificed than the former.<sup>1</sup> In view of the almost frightful rôle which the airship is likely to play in future

<sup>1</sup> Compare Hyde, *International Law*, Vol. II, p. 322, and Wilson's suggested code of aerial warfare (Art. 28) in *U. S. Naval War College Pubs.*, 1920. These authors suggest that bombardments by aircraft should be forbidden unless a "compensating advantage can be shown." Compare also Oppenheim, *International Law*, 3rd edition, Vol. II, p. 302, who remarks that the limits within which aircraft ought to be allowed "to raid outside the theater of military and naval operations" should be determined. Also Kuhn (*Procs. Amer. Soc. of Int. Law*, 1921,

wars and the consequences to which non-combatant populations and private property will be exposed in case no restrictions are placed upon its use, it is of the highest importance that an agreement among the powers should be reached and adequate regulations embodied in an international convention<sup>1</sup>. As yet, Article 25 of the Hague Regulations is the only internationally binding restriction in force and as the events of the late war demonstrated, it is of little value.

Other important questions to which aerial war has given rise are likewise still unregulated. Such are those relating to the rights and duties of belligerents and neutrals in respect to each other. First in importance, perhaps, is the question whether the aircraft of belligerents may engage in hostilities in the aerial space over the territory of neutral states. Practically all writers are in agreement that this is not permissible and a prohibition to this effect is found in various proposed codes of aerial warfare.<sup>2</sup> To permit such operations over the territory of a neutral state would manifestly expose the inhabitants to grave danger from falling bombs and disabled aeroplanes. For the same reason it is not permissible for belligerents to conduct their operations so near the frontiers of a neutral state as to expose the inhabitants thereof to danger. A second question is whether the aircraft of a belligerent may enter the aerial space above neutral territory for purposes of observation or pass through it for the purpose of attacking an enemy state which lies beyond. Some writers like Fauchille maintain that the latter right should be allowed in the upper zone, otherwise a belligerent which has no sea

p. 79) who proposes that the dropping of bombs, explosives and other destructive agents, from aircraft, be prohibited by a conventional rule of international law, except within the regular line of fire of military or naval forces of the belligerent to which the air craft belongs.

<sup>1</sup> Compare De Montmorency, in the *British Year Book of International Law* (1921-22), p. 167.

<sup>2</sup> Except Fauchille's, which allows belligerent operations over neutral territory subject to certain conditions.



frontage and is separated from his enemy by an intervening neutral state could not attack him by air.<sup>1</sup> In short, aerial warfare in such a case would be impossible. But Spaight and the majority of writers, on the other hand, point out that such right of passage can no more be allowed than the passage of armies over neutral territory without a violation on the part of the neutral of his duties of neutrality.<sup>2</sup> Belligerents are therefore, not only bound to abstain from committing hostilities in the air space over neutral states, but from passing through it for the purpose of attacking an enemy. Neutrals, on their part, are also bound to exercise due diligence and employ such means as are at their disposal to prevent such acts.<sup>3</sup> This view of the rights and duties of both belligerents and neutrals was that which neutral governments, generally, adopted during the World War. On various occasions British, French, German and Italian aviators flew over Swiss territory and in two instances German aviators dropped bombs upon Swiss towns killing or wounding several persons and committing some damage to private property. On another occasion a fight took place near Basle between a German and a French aviator during which a number of bombs fell upon Swiss territory. Against these acts the Swiss government protested. Apologies were duly made, indemnities were paid for the damage done and it was explained

<sup>1</sup> Fauchille's proposed code even allows belligerents to carry on hostilities over the territory of neutral states provided they are not acts "capable of causing the fall of projectiles or of causing damage generally" (Pt. II, Ch. 1, Art. 1). But the circulation of belligerent military aircraft over neutral territory is allowable only by authority of the neutral. If they enter neutral territory they must not remain longer than 24 hours; they must do nothing to augment their military power, etc. (Art. 19).

<sup>2</sup> Spaight, *op. cit.*, p. 65. Spaight's own proposed code (Art. 2) forbids belligerent military aircraft from entering the territory, territorial waters or air space of a neutral power. So does Le Moyné's *projet* (art. 3). De Hooghe's proposed code (Art. 1) forbids hostilities, including observation, above neutral territory but allows the free passage of belligerent aircraft for other purposes.

<sup>3</sup> Compare Art. 12 of Spaight's proposed code (*op. cit.*, p. 118).

that the incidents resulted from error and not from deliberation. Soon after the outbreak of the war the Swiss government notified the governments of the neighboring belligerent powers that flying over Swiss territory by their aviators was forbidden and that every effort would be made to prevent such acts.<sup>1</sup> Instructions were given to the military authorities to fire upon aviators guilty of violating Swiss neutrality and in several cases they were fired upon. The Dutch government adopted a similar policy in respect to German aircraft which passed over the Netherlands frequently and in large numbers in the course of their raids upon England. It protested against such passage as being in violation of the neutrality and sovereignty of the country. The German government gave repeated assurances that strict orders had been given its aviators to abstain from flying over neutral territory, but they were not observed and the Dutch government instructed the military authorities to fire upon the offending aviators, which they sometimes did with success. The Danish, Norwegian and Swedish governments adopted essentially the same attitude regarding the passage of belligerent aircraft over their territories and territorial waters.<sup>2</sup>

From this brief review of the practice during the World War, it will be seen that neutral states all asserted and maintained that the aircraft of belligerents had no right either to engage in hostilities in the air space over their territory or even to pass through it on their way to attack the enemy. All issued formal orders prohibiting such operations or passage and adopted the means at their disposal to prevent violations thereof.

<sup>1</sup> The Swiss ordinance of August 4, 1914, concerning the maintenance of neutrality, forbade the passage of foreign aircraft over Switzerland. Such passage would be "opposed if necessary by all available means" (art. 17).

<sup>2</sup> The whole matter of aerial passage over neutral territory during the World War and the measures adopted by neutral governments are discussed in detail in my *Int. Law and the World War*, Vol. I, Ch. 19, and in Rolland's article *Les Pratiques de la Guerre Aérienne*, in the *Rev. Gén.* (1916), pp. 497 ff.

Belligerents on their part readily admitted the right of neutrals to exclude their aircraft from navigating over neutral territory; they instructed their aviators to refrain from entering the air space over neutral states and whenever these instructions were violated by error or otherwise, explanations and expressions of regret were offered and when damages were committed indemnities were paid. It would seem, therefore, that the right of neutrals, on the one hand, and the duty of belligerents, on the other, in this matter may be regarded as settled even though there is as yet no international convention regulating it. That belligerents may exclude the aircraft of neutral states from flying over their territory or restrict it in such manner as they see fit, whenever considerations of a military character require it, follows logically from the rule laid down by the International Air Convention which recognizes the sovereignty of states over the air space above. Although this convention is applicable only in peace times no one would contend that if a state is admitted to be sovereign over the air space above its territory in time of peace, it is any the less sovereign over it in time of war. On the contrary most of those who deny the right of control in time of peace readily grant it in time of war.

There are a good many other questions connected with aerial warfare which remain to be settled. Some of them arose during the World War and they led to irritating disputes between belligerents and neutrals.<sup>1</sup> Among them may be mentioned: the status of disabled airships and their crews who are compelled to land in neutral territory, the status of disabled sea planes which are salvaged and brought into neutral ports, the treatment of captured aviators who have been guilty of bombarding

<sup>1</sup> Some of them are discussed in my *Int. Law and the World War*, Vol. I, pp. 475 ff. and pp. 494 ff. See also Fauchille, *Droit Int. Public*, Vol. II (1921), pp. 765 ff.; De Montmorency, *Br. Yr. Book*, II, p. 172, and Kuhn, *Procs. Amer. Soc. of Int. Law*, 1921, p. 80, where a list of matters which ought to be regulated by a code of aerial law is given.

undefended places in violation of Article 25 of the Hague regulations, the conduct of hostilities in the immediate proximity of neutral frontiers, and others. Some of them are dealt with in various code projects that have been proposed, but there is no international convention regulating them and the practice of the late war was too limited and too conflicting to furnish precedents for guidance in future wars.

I come in the last place to consider the status of the air space as a medium for the transmission of radio-telegraphic correspondence. Since the use of the air space for this purpose does not expose subjacent states to danger from falling objects as does its use for purposes of navigation there is no need of state control over it for the protection and security of the inhabitants. Nevertheless, the transmission of dispatches through the air from stations in one country to another may interfere with local telegraph communication in intervening states through the interruption which it may cause to the movement of the air waves. Moreover, in various ways it may be made the medium by which the neutrality of a country may be violated in time of war. For these reasons therefore, it must be admitted that states are entitled to exercise some control over the sending of radio-telegrams through the air space above them. The Russo-Japanese War of 1904-05 was the first one in which wireless telegraphy was employed and in which some of the questions were raised. Early in 1904 there appeared in the waters adjacent to Port Arthur, a Chinese dispatch boat, the *Haimun*, carrying a London *Times* correspondent supplied with wireless telegraph apparatus by means of which he sent his dispatches to a neutral station at Wei-hai-wei, whence they were transmitted to London. Apparently suspecting that the *Times* correspondent was engaged in transmitting, or might transmit, military information to the Japanese, Admiral Alexieff made public a declaration to the effect that newspaper correspondents on board neutral vessels who should communicate news to the enemy "by means of improved apparatus not yet

provided for by existing conventions" should be regarded as spies and the vessels provided with such apparatus would be seized as lawful prizes—an announcement which recalled Bismarck's threat in 1870 to treat balloonists crossing the lines as spies. There is no evidence in this particular case that wireless telegraphy was being employed or intended to be employed for the purpose of communicating information to one of the belligerents, and in any case, the threat to treat such persons as spies revealed a lamentable ignorance of what constitutes espionage. Another incident involving the use of wireless telegraphy was the installation in the summer of 1904 by the Russians of a wireless telegraph station at the neutral Chinese port of Chefoo for the transmission of messages from Port Arthur. The Chinese authorities realizing that this act constituted a violation of the neutrality of the country caused the station to be dismantled.<sup>1</sup>

The Hague Regulations of 1899, which were binding upon both parties, enumerated newspaper correspondents and reporters as among army followers who are entitled to be treated as prisoners of war and among those who were expressly excluded from the category of spies were "individuals sent in balloons to deliver dispatches" (Articles 13 and 29). A newspaper correspondent engaged in sending dispatches by wireless could hardly be placed in a different category. The Chefoo incident caused the second Hague conference to adopt rules dealing with such situations. They forbid belligerents from erecting on the territory or in the ports or waters of neutral states, of wireless telegraph stations or apparatus intended to serve as a means

<sup>1</sup> For the details concerning these incidents see Hershey, *International Law and Diplomacy of the Russo-Japanese War*, Ch. 4; Lawrence, *War and Neutrality in the Far East* (2nd ed.), pp. 83 ff. and 218 ff.; Smith and Sibley, *op. cit.*, pp. 71 ff.; and *International Law Situations*, 1907, pp. 159 ff. See also the comment by Rolland in 17 *Rev. Gén.*, pp. 88 ff. and a bibliography of the literature dealing with wireless telegraphy and international law, p. 92. See also the discussion by Kebedgy in 36 *Rev. de Droit Int.* (1904), pp. 445 ff.

of communication with belligerent forces on land or sea and neutrals themselves are forbidden to permit such acts to be committed in their territory.<sup>1</sup>

During the World War neutral states adopted effective measures to prevent the violation of their neutrality by means of wireless communication. In the United States the government at the outbreak of the war in Europe established a censorship of all wireless communication between the United States and belligerent countries in order to prevent the transmission or receipt of messages of an unneutral character, but it appearing shortly afterwards that the censorship regulations were being evaded, the government took over the entire control of all high-powered wireless stations.<sup>2</sup> Ships of all belligerent countries entering the waters of the United States were forbidden to use their radio apparatus while within the jurisdiction of the country

<sup>1</sup> Convention respecting the Rights and Duties of Neutral Powers and Persons in case of war on land, Arts. 3 and 5.

<sup>2</sup> Executive order of Sept. 5, 1914, issued in pursuance of the act of Aug. 13, 1912 to regulate radio communication. German sympathizers in the United States complained at the censorship established over wireless communication between the U. S. and Germany, which was the only means of communication with Germany left after the cutting by the allied powers of the cables connecting with Germany, while cable communication with Great Britain was unrestricted. But the American government pointed out that the two methods of communication were very different. By means of wireless telegraphy military information could be sent from the U. S. to German warships on the high seas whereas such information could not be sent by cable. Furthermore, it pointed out that Germany had a right to protect herself against the sending of information from neutral territory to her enemies by means of cables, by cutting the cables as Great Britain and France had already done. It should be said also that the German government was permitted to communicate with its embassy at Washington through the medium of the American ambassador at Berlin under its own cipher or by means of wireless and in a private code known only to the American government. The measures taken by the American government were not therefore discriminatory against Germany, but were necessary to protect the U. S. against having its territory made the source of military information. See the letter of Sec. Bryan to Senator Stone of Jan. 20, 1915 in *Dip. Cor. with Belligerent Governments Relating to Neutral Rights and Duties*, Dept. of State, *European War*, No. 2, p. 61, and my *Int. Law and the World War*, Vol. II, pp. 412-13.

and they were required to seal their apparatus during the period of their stay. Other neutral powers generally adopted similar measures.<sup>1</sup> In some of them radio stations were closed and, generally, wireless apparatus on belligerent vessels in neutral ports were required to be dismantled.

As has already been pointed out, the Institute of International Law at its session at Ghent in 1906 adopted several rules relating to the use of wireless telegraphy, one of which affirmed the right of every state in so far as was necessary to its security, to "oppose" the passage above its territory and territorial waters, and as high as need be, the passage of Hertzian waves, but at the same time it declared in favor of the general principle of the freedom of the air. Before the outbreak of the World War it was generally admitted that states were fully entitled to exercise such control over the transmission of messages through the air space above them as was necessary to their security, and the practice of the World War established their right to exercise the control necessary to protect their neutrality. But the important question whether a state may forbid the sending of messages from one state to another through the air space above it for the reason that the transmission of such messages might interfere with its own use of the air for local telegraphic correspondence, remained unsettled. This question was raised in 1905 when the British government proposed to organize a wireless telegraph service with Italy

<sup>1</sup> See notably the neutrality measures of Chile, Colombia, Cuba, Guatemala, Switzerland and Uruguay, in U. S. *Naval War College. Int. Law Topics* for 1916 where the texts may be found. The British and French governments complained on several occasions that the neutrality of certain Latin-American countries was violated by the sending of wireless messages from stations in their territory to German warships in the South Atlantic and Pacific oceans. See also the curious case of the erection of a radio telegraphic station in Belgian commune of Bar-le-Duc which is entirely surrounded by Netherlands territory and the measures adopted by the Dutch government to prevent the sending of messages therefrom, described in my *Int. Law and the World War*, Vol. II, pp. 414-15.

which would have involved the transmission of messages through the air space above the territory of France. The French government at once raised objections to the establishment of the proposed service because of the alleged interference which it might cause with the operations of its own telegraph service. The British government denied that the proposed service would produce any such effects, but the conditions insisted upon by the Italian government being unacceptable to the British government, the matter of establishing the service was dropped.<sup>1</sup> The question thus raised was one of the highest importance because if it is within the right of a state to prohibit the transmission of international correspondence through the air space above its territory, for no other reason than that may cause inconvenience to its own telegraphic service, the World may be deprived of one of the chief advantages of one of its most marvellous inventions. Many writers have occupied themselves with the discussion of the question. Professor Rolland of Paris, who has written much on the subject, concludes that a state may rightfully forbid the transmission through its air space of messages from foreign countries when such transmission interferes with its own telegraphic service.<sup>2</sup> Professor Meili was of the same opinion.<sup>3</sup> The resolutions of the Institute of International Law referred to above apparently also intended to sanction the right although they speak only of measures of "security." Fauchille, in his report to the Institute in 1901, appears also to have admitted the right of control although he pointed out that it might be exercised in such a manner as to render international communication by wireless

<sup>1</sup> Fauchille, *La Télégraphie sans Fil et Le Droit International*, *Rev. de Droit International et de Lég. Comp.*, Troisième série, T. I. (1920), p. 17.

<sup>2</sup> See his article *La Télégraphie sans Fil et le Droit des Gens*, *Rev. Gén.* 1906, p. 75.

<sup>3</sup> *Die Draghtlose Télégraphie im internen Recht und Volkerrecht* (1908), p. 56.



telegraphy impossible. In order to reduce as far as possible this eventuality, he proposed that the right of prohibition be limited to the defense of the national security. The rule finally approved by the Institute affirmed the right of states, not to "prevent" but to "oppose" the passage of Hertzian waves over their territory so far as necessary to their "security."<sup>1</sup>

In the meantime, the question was being considered by official international conferences. A preliminary conference on radio telegraphy was held at Berlin in 1903 and a second one assembled in the same city in November, 1906, and it agreed upon an International Radio Telegraph Convention, which was signed by the representatives of some twenty-six powers.<sup>2</sup> It was followed by a third conference at London in 1912, which concluded, on July 5, an International Wireless Telegraph Convention signed by some thirty powers.<sup>3</sup> These conventions, however, do not deal directly with the important question under consideration and they contain no express reservation of the right of states to forbid the passage over their territories of Hertzian waves for any reason. Nevertheless Fauchille thinks that an inference may be drawn from article 8 of the convention of 1906 and from article 40 of the *règlement de service* annexed to the convention.<sup>4</sup> Article 8 of this convention declares that "the working of the wireless telegraph stations shall be organized as far as possible in such manner as not to disturb the service of other wireless stations," while Article 40 of the annex declares that the exchange of correspondence between ship board stations "shall be carried on in such manner as not to interfere with the service of the coastal stations." It would seem to follow from these provisions that the signatory powers,

<sup>1</sup> 21 *Annuaire de l'Institut*, pp. 82-83; see also Fauchille's later article cited on the preceding page, p. 10.

<sup>2</sup> Text in Charles, *Treaties Between the United States and Other Powers*, pp. 151 ff.

<sup>3</sup> Text, *ibid*, pp. 185 ff.

<sup>4</sup> Article cited above in *Rev. de Dr. Int. et de Lég. Comp.*, 1920, pp. 11-12.

while recognizing that the service of one radio telegraph station might interfere with that of another, did not intend to authorize the state thus affected to oppose the passage of Hertzian waves over its territory merely because they might disturb its own communications, but contemplates the organization "as soon as possible" of its service in such a manner as not to cause injury to others. Fauchille's own conclusion is that under the convention of 1906 a state cannot oppose the passage over its territory of Hertzian waves: that at most, it has merely the right to suspend the international radio telegraph service, if it is demonstrated that its communications affect injuriously its national security, the public order or the public morals.<sup>1</sup>

This interpretation of the intent of the convention is also that reached by Meurer.<sup>2</sup> But Meili adopted the contrary view, namely, that there was no intention of depriving states of their right to prohibit, temporarily or permanently, the passage of Hertzian waves over their territory.<sup>3</sup> The question therefore remains within the realm of controversy. The science of radio telegraphy has as yet found no means by which disturbances caused by the transmission of dispatches from one state to the wireless stations of another state may be prevented. Until such a discovery is made, states will probably insist, as France did in 1905 in connection with the proposed establishment of a radio service between England and Italy, upon their right to forbid or restrict the use of the air space above their territories for the transmission of radio telegrams whenever it interferes with the functioning of their own radio service. If such a right is admitted, it is to be hoped that it will be exercised with due regard to the general interests of the world as they are subserved by the science of wireless telegraphy. Mere inconveniences to which a

<sup>1</sup> *Ibid.*, p. 18.

<sup>2</sup> *La Faculté de s'Opposer au Passage des Ondes Hertziennes*, *Rev. Gén.*, 1909, p. 76.

<sup>3</sup> *Op. cit.*, p. 81.

state may be exposed by the transmission of international correspondence though its air space will never justify it in pushing its right of sovereignty to the limit and of forbidding the exploitation of a great international service of such far-reaching importance to mankind.

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## LECTURE V

### **Interpretation and Application of International Law in Recent Wars**

#### I

#### THE ANGLO-BOER WAR.

In the four following lectures, I purpose to inquire into the influence, if any, which the Hague Conventions have exercised upon the conduct of belligerents and neutrals in the more important wars that have occurred since the Conference of 1899, and to review the interpretation and application of those and other recent international conventions during such wars.

During the summer of 1899, while the first Conference was sitting, its deliberations were disturbed by a threatening controversy then raging between Great Britain and the South African Republic (the Transvaal). In less than three months after the adjournment of the Conference, when the ink with which its final act had been signed was hardly dry, war broke out between the two disputants and the Transvaal was promptly joined by the Orange Free State. Great Britain had participated in the Hague Conference and had signed the convention for the pacific settlement of international disputes and also the convention respecting the laws and customs of war on land. Neither of the Boer republics, however, had been admitted to participate in the Conference and were not, therefore, bound by the obligations and prohibitions of its conventions and declarations, except in so far as they were merely declaratory of the established customary law of nations. The outbreak of the war thus afforded the first opportunity for testing in some degree the efficacy of the Hague Conventions and Declarations. Unfortunately, the machinery and processes of the convention for

the pacific settlement of disputes proved ineffective to prevent the outbreak of the war. In the main, the controversy between Great Britain and the Transvaal Republic related to the nature of the political relations between them under conventions concluded in 1881 and 1884.<sup>1</sup> By the latter convention Great Britain appears to have admitted that the South African republic was an independent and sovereign state subject to the provisions of Article 4, by which the republic agreed "to conclude no treaty or engagement with any state or nation other than the Orange Free State—until the same had been approved by Her Majesty." The convention of 1881 had referred to the republic as a territory with "complete self-government subject to the suzerainty of Her Majesty" but in the convention of 1884 all reference to suzerainty was omitted and the suppression of this language appears to have been made upon the insistence of the Boer negotiators so as to leave no doubt as to the independence of the republic in respect to all matters except the power to make treaties.<sup>2</sup> Some years later, however, when the controversy between the British and Boer governments became acute in regard to the policy of the latter in respect to the treatment of foreigners, the British government took the position that the British suzerainty had not been terminated by the convention of 1884, and that in consequence, it had a right to insist that the South African Republic should make certain modifications in its legislation so as to permit foreigners to acquire more easily civil and political rights.<sup>3</sup> This claim the Boer government denied and maintained that the government of Great Britain had no right to interfere in the internal affairs of the republic. Into the

<sup>1</sup> The texts of these conventions are printed in Baty, *International Law in South Africa*, pp. 102 ff.

<sup>2</sup> Despagnet, *La Guerre Sud-Africaine au Point de Vue du Droit International*, p. 6; also note of Mr. Leyds, Secretary of State for Foreign Affairs of the Transvaal Republic, *London Times*, May 26, 1898.

<sup>3</sup> English Blue Book, Feb., 1884, "Further Correspondence relating to Affairs in the South African Republic, cd. 8721.

merits of this controversy, I cannot go.<sup>1</sup> In the last analysis, the controversy was largely one of treaty interpretation : namely, whether the convention of 1884 had terminated the suzerainty which the convention of 1881 recognized, and whether, therefore, it had deprived the British government of all right of control over the internal affairs of the South African Republic. The Boer government, considering such a question to be particularly adapted to arbitration, offered to submit the dispute to the arbitral judgment of the Orange Free State or to the Swiss government, but this proposal was not acceptable to the British government because it would be "incompatible with the position which Her Majesty occupies, to submit to arbitration the definition of the conditions under which she has accorded autonomy to the Republic." The Hague Convention for the pacific settlement of international differences had not at that time come into existence, and, even if it had been in force, it is doubtful whether it would have imposed any obligation on the British government to arbitrate a question such as this, which involved the political relations between states. The convention, to be sure, declares that "in questions of a legal nature, and especially in the interpretation and application of international conventions, arbitration is recognized as the most effectual and at the same time, the most equitable, means of settling disputes which diplomacy has failed to settle." But it seems clear from the discussion of the matter in the conference that the opinion thus expressed in favor of the arbitration of disputes concerning the interpretation of treaties had reference to disputes of a legal character rather than those involving questions of political relations. In the existing state of public sentiment concerning the scope of arbitration the British government can hardly be

<sup>1</sup> The matter is fully considered by Despagnet, *op. cit.*, pp. 10 ff., and by Westlake, *Collected Papers on International Law*, pp. 419 ff. See also Baty, *International Law in South Africa*, Ch. II.

reproached for declining to arbitrate the dispute, although it is to be hoped that in the further evolution of international arbitration states will consent to arbitrate such questions as this.<sup>1</sup> Recourse to arbitration having been rejected, there remained the resources of good offices and mediation. By the time the controversy had reached its final stage the Hague conference had completed its work and the mediatory machinery of the convention for the pacific settlement of international differences was waiting to be called into action. In June, soon after the conference had assembled, the Dutch and German Governments had advised the South African Republic to adopt a moderate attitude and to invite the mediation of a disinterested power, apparently the United States being the power which they had in mind, but President Kruger did not consider that the time had yet come for inviting the mediation of the United States.<sup>2</sup> Neither party appears to have requested the

<sup>1</sup> M. Despagnet (*op. cit.*, pp. 23-25), condemns the British government for refusing to arbitrate the dispute, but Professor Westlake (*op. cit.*, p. 439) points out that the issue involved was political and not legal and was, therefore, not embraced within the category of arbitral differences contemplated by the Hague Convention. He says "but since our policy in South Africa comprised as an essential element the dependent character of the South African Republic, we could not accept a decision by an arbitrator that such was not its character." It may be contended that in the North Atlantic Fisheries case (1909) the British government did submit to arbitration a somewhat similar question, namely, the question of the right of the British or colonial legislatures to enact legislation affecting the exercise of a treaty right granted by one party to the nationals of another. But upon examination it will be found that the issue in this case was fundamentally different from that involved in the controversy between Great Britain and the South African Republic since the former did not involve political relations between one state and another state which, it was asserted, was in some degree a vassal of the former. Mr. Leyds in his correspondence with Mr. Chamberlain in 1897 asserted that "history was full of examples of arbitration between suzerains and vassals" but he cited no instances of such arbitration.

<sup>2</sup> Campbell, *Neutral Rights and Obligations in the Anglo-Boer War*, p. 48. But in October after the outbreak of the war, President Kruger addressed the American people with a view to inducing the United States to mediate to bring about the restoration of peace.

mediation of any other power to prevent the outbreak of the war nor did any "stranger" to the controversy offer its good offices or mediation, in accordance with the recommendations of the Hague convention, because there was no reason to believe that such an offer would have been favourably received by both parties.<sup>1</sup> In March, 1900, some months after the outbreak of the war, the government of the Transvaal Republic requested the President of the United States to "intervene" with a view to bringing about a cessation of hostilities. The request was communicated to the British government with an offer of the President to "aid in any friendly manner to promote so happy a result." Lord Salisbury promptly expressed his thanks for the "friendly interest shown," but added that "Her Majesty's government could not accept the intervention of any power."<sup>2</sup> No other offers were made and the war continued until the Boers were compelled by defeat to sue for peace. Thus the processes of the Hague convention were entirely ineffective both for preventing the outbreak of the war or for terminating hostilities after they had begun.

During the course of the war, many questions of international law were raised. Some of them involved the interpretation and application of the Hague and Geneva conventions ;

<sup>1</sup> The German imperial chancellor later asserted that Germany had been willing to act as mediator but since there was no assurance that the offer would be accepted by both parties she made no offer in that direction. "We therefore did," he said, "what we could as a neutral power and without imperilling direct German interests, in order to prevent the outbreak of war." Speech in the *Reichstag*, December 10, 1910. The United States Secretary of State in May, 1900, informed a delegation of the Transvaal government which called on him at Washington, that "there had never been a moment when the President would have neglected any favorable occasion to use his good offices in the interest of peace." Moore, *Digest*, Vol. VII, p. 19. The Dutch minister of foreign affairs stated to the upper chamber of Parliament in November, 1899, that the Netherlands government would always be found disposed, if circumstances offered an occasion, to employ all its means to bring the war to an end.

<sup>2</sup> Moore, *Digest*, VII, p. 20.



others, the rules of the customary law of nations. The first important question related to the legal character of the conflict. Was it an international war, and therefore one in which the Boer combatants were entitled to all the benefits of the law of nations governing the status of belligerents? Or was it an insurrection—a mere revolt against an established authority—the participants in which were liable to be treated as insurgents or rebels and punished as such under the municipal law of Great Britain? If it was an international war, the rights of visit, search and capture at sea would be legitimate belligerent acts; if it were merely an insurrection, the rights of Great Britain over neutral commerce would be limited. In the beginning, the British government, following the action of the United States government at the outbreak of the Civil War, was disposed to regard the war as an insurrection. This view appears to have been expressed in the address of the Queen in dissolving parliament, and according to the press dispatches neutral powers are said to have been so informed.<sup>1</sup>

The seizure by a British cruiser on November 23, shortly after the outbreak of the war, of the French merchantman *Cordoba*, on the suspicion of carrying contraband, brought the question to the front. The French government complained that the seizure was not justified, if as the British government appeared to maintain, the conflict was merely a revolt. But the British government now replied that it was in a state of war with the South African republics and was not simply engaged in suppressing a revolt. In the same month neutral powers are said to have been notified by Great Britain of the existence of war in the international sense.<sup>2</sup> But in according full belligerent rights to the Boers the British government stated that it did not renounce Great Britain's claim of suzerainty over the Transvaal republic. The earlier opinions of the press as well

<sup>1</sup> Despagnet, *op. cit.*, p. 93.

<sup>2</sup> *Ibid.*, pp. 24-25.

as the apparent attitude of the government that the South African conflict could be treated merely as an insurrection were quite untenable. The Orange Free State which had joined its sister republic in the war was admitted to be a fully independent state, and as to the Transvaal republic, it was admitted by the British government to be at least a part sovereign state and it was, in fact, a party to the Geneva convention by accession.<sup>1</sup> Armed hostilities with such states constituted therefore an international war and not simply a revolt and this was readily admitted by English authorities on international law, such as Professor Westlake.<sup>2</sup> In consequence, the Boer combatants were entitled to the benefits of the ordinary law of nations governing the conduct of belligerents and Great Britain on her part was entitled to exercise full belligerent rights over neutral commerce with the enemy.

At the outset, both belligerents apparently desired to make the contest a "white man's war" because the native population greatly outnumbered the Boer and British element combined and it was feared that the arming of the blacks would expose the white race to grave danger. But the presence of a large native population which was available for various auxiliary purposes proved too strong a temptation for both sides to hold to their original intentions. Kaffirs were, therefore, early employed for driving ammunition wagons, acting as scouts, guides, etc.; from the first they were also employed as spies and later for defending railroads.<sup>3</sup> In some cases they voluntarily

<sup>1</sup> Baty, *op. cit.*, pp. 45 ff., maintains that it was a *Mi-souverain* State, a real international person, though an abnormal one since it did not possess all the sovereign rights of an independent state.

<sup>2</sup> Professor Westlake said at the time: "We are then internationally at war. The idea which is often expressed in a part of the press that it is not an international war, but that it is possible to treat the enemy as insurgents, is perfectly absurd. No serious person who knows anything would maintain it for a moment." *Collected Papers on International Law*, p. 458.

<sup>3</sup> Spaight, *War Rights on Land*, p. 70. See also *Times History of the South African War*, Vol. II, p. 139. A. Conan Doyle, *The*

joined the British forces to aid in repelling Boer attacks which they erroneously believed to be directed against themselves. It is said that the British commanders endeavored to dissuade the Kaffirs from taking active part in the hostilities. Believing, however, that they were being generally employed by the English for combatant purposes, the Boers resorted to reprisals against them which in some cases amounted to extreme cruelty. In consequence, English commanders adopted the practice of furnishing its Kaffir employees with arms to enable them to defend themselves. From this it was but a short step to their employment in general military operations.<sup>1</sup> Both sides accused the other of employing the Kaffirs as soldiers and the Transvaal government, in particular, denounced the conduct of the British authorities as an "unpardonable crime contrary to all the rules of civilization."<sup>2</sup>

In the main, the Boer forces fulfilled the four requirements laid down in the Hague regulations as essential conditions entitling them to be treated as lawful combatants although they did not generally wear uniforms and there appear to have been instances in which they did not carry their arms openly.<sup>3</sup> Great Britain, however, at both the Brussels and Hague Conferences had taken very advanced ground in regard to the right of the population to take up arms and resist the approach of an invader and the British commanders were disposed to regard with leniency, at least during the early stages of the war, the failure of the Boers to comply strictly with the Hague requirements regarding *levées en masse*. During the latter part of the war the practice of the Boers of appropriating and

*War in South Africa*, p. 120; Spaight, *op. cit.*, p. 70. Bordwell, *Law of War*, p. 140, and Despagne, *op. cit.*, p. 121.

<sup>1</sup> *Times History*, Vol. V, pp. 249, 502; Spaight, p. 71, and Doyle p. 121.

<sup>2</sup> Despagne, p. 122. General De Wet in his *Three Years' War*, (p. 179) asserts that on one occasion he captured 50 Kaffir prisoners who were fighting with the British forces.

<sup>3</sup> Bordwell, *op. cit.*, p. 141, and Baty, p. 86.

wearing British uniforms proved to be a source of embarrassment to the British commanders, but whenever it appeared that the enemy uniform had been donned by the Boers because they had no other available apparel and not for the purpose of deception, the act was not punished.<sup>1</sup> Sniping appears to have been a common practice among the Boers and this offense was dealt with severely by the British authorities whenever the culprit was caught. In case he was not caught, the house from which the offense was committed was burned whenever it could be identified. During the later years of the war when the Boer armies were broken up, guerrilla fighting was common and the British authorities dealt severely with those participating in such operations.<sup>2</sup> By a proclamation of August 7, 1901, Lord Kitchener announced that combatants in small bodies who were powerless to repel the invader and who resorted to guerrilla fighting only to harass, would not be regarded as lawful combatants, and would, if caught, be punished with banishment. The proclamation was widely condemned on the continent and even in the British House of Commons it found severe critics in men like Sir William Harcourt.<sup>3</sup> In fact, however, the proclamation does not appear to have been enforced.<sup>4</sup> It seems to have been based on the theory that the Boer struggle having become hopeless, the continuance of guerrilla methods, even if the participants complied with the Hague regulations regarding the conditions of lawful combatants,

<sup>1</sup> Spaight remarks that the Boers were hardly to blame for wearing British uniforms because they were reduced to the necessity of doing so by the action of the British themselves in burning the clothes left by the Boers at their homes and even in destroying the hides in the tanneries. *Op. cit.*, p. 108.

See also General De Wet's defense in his book *Three Years' War*, pp. 233-234.

<sup>2</sup> Spaight (*op. cit.*, p. 63) remarks that the British authorities "went too far when they proscribed all guerrilla fighting, since it is a perfectly legitimate means of combat within certain limits."

<sup>3</sup> See his letter in the *Times* of Nov. 8, 1901.

<sup>4</sup> Spaight, p. 65, and Despagnet, pp. 347, 350.

was not entitled to be recognized as legitimate.<sup>1</sup> There were, of course, charges and counter-charges by both sides of violations of the white flag and of the Geneva convention and in a few cases of refusing quarter, but they were always denied or justified on the ground of error or misunderstanding.

Among the early charges which each belligerent made against the other was the use of expanding bullets (dum dums) forbidden by one of the Hague Declarations. Great Britain had reserved her ratification to the Declaration and the Boer governments not having participated in the Hague Conference neither was bound by it. According to the report of the British commission on the causes of the war, the dum dum ammunition which the British government had sent to South Africa before the war for target practice was withdrawn at the outbreak of the war because it had been found unfit for use. The commission stated in its report that it was withdrawn not because of the Hague Declaration forbidding its use, but because of its unsatisfactory character, though the commission admitted that it was "impossible to avoid a feeling that the Declaration had a certain moral effect and that it was not considered desirable to use an expanding bullet in time of war."<sup>2</sup> The fact that dum dum bullets were occasionally found on captured British soldiers was explained as being purely accidental and due to a blunder by which, in the packing, a small quantity had got mixed up with the ammunition which was issued to the army.<sup>3</sup> A careful study of the evidence available, points to the

<sup>1</sup> Compare Bordwell, p. 141.

<sup>2</sup> Apropos of the moral effect of the Hague Declaration, Spaight (*op. cit.*, p. 80, n. 8) remarks that Lord Roberts's protest against the employment by the Boers of expanding bullets was a "good indication of the morally binding force of an international declaration relating to war usage, as affecting even a dissentient or non-signatory government." He thinks that the opinion expressed at the Hague Conference against the employment of such bullets had as much to do with their withdrawal from South Africa as the reasons given by the commission in its report.

<sup>3</sup> Doyle, *The War in South Africa, Its Cause and Conduct*, p. 125.

conclusion that in a few instances expanding bullets were used by both sides, but it was not general and the British authorities apparently endeavored to prevent their employment.<sup>1</sup>

Regarding the methods employed by the contending belligerents, there were likewise many charges and counter-charges of violations of the Hague Convention and the customary laws of war. The British authorities early complained that the authorities of the Orange Free State were compelling British subjects to enroll in its forces and to fight against the British armies, though the charge was denied. The Boer invaders of Cape Colony were likewise accused of compelling British subjects to join their forces under penalty of being driven from their homes and having their property commandeered. Against this "barbarous practice of attempting to force men to take sides against their own sovereign and country by threats of spoliation and expulsion," Lord Roberts vigorously protested.<sup>2</sup> The British authorities likewise protested against the action of the Transvaal and Orange Free State governments in expelling at the outbreak of the war all British subjects, including old men, women and children except those who were granted permission to remain. The Boer authorities replied that the expulsion was an indispensable measure of military necessity. But the order does not appear to have been strictly enforced except at Johannesburg and from this place many of the Uitlanders had in fact, voluntarily fled before the outbreak of the war.<sup>3</sup> Expulsions by the British for military reasons were

<sup>1</sup> See on the whole matter, Bordwell, pp. 138-140; Spaight, pp. 79-80; Doyle, *op. cit.*, pp. 133-125; Despagnet, pp. 107-113; and Merignhac, *Rev. Gén.*, 8, 108 ff. See also the Report of His Majesty's Commissioners on the War in South Africa, pp. 86 ff., and Parliamentary Papers Relating to the Administration of Martial Law in South Africa, cd. 981.

<sup>2</sup> Spaight, p. 145, and *Times History*, Vol. III, p. 86; Despagnet, pp. 144-145; and Bordwell, p. 143. See also Parl. Papers, 1900, Vol. LVI, cd. 430-53.

<sup>3</sup> Spaight, p. 30, and Despagnet, pp. 143, 225.

also not lacking. In both cases hardships resulted, but the right of a belligerent to expel for military reasons enemy aliens and even neutrals is generally recognized.

Regarding the treatment of prisoners there were, as in every war, mutual charges of neglect, undernourishment, brutality, etc. The conduct of the Boers, at least prior to their inauguration of the system of guerrilla warfare during the later years of the war, was not the object of severe complaint and British commanders occasionally expressed their gratitude for the kindly treatment which British prisoners received at the hands of their captors.<sup>1</sup> Their worst offense was the systematic practice of stripping (*uitschudden*) their captives and appropriating their uniforms, which they justified, in part, on grounds of necessity, and in part, as a measure of reprisal against the British for having burned their clothes left on the farms and for having destroyed the hides in the tanneries.<sup>2</sup> Generally, the practice did not result in cruelty, though instances were not lacking in which the victims were left naked far from any white settlement or British force.<sup>3</sup> The treatment of Boer prisoners by the British was the subject of much complaint on the part of the Boer authorities,<sup>4</sup> but Professor Spaight, who served in the South African War, and whose judgment in such matters is unusually fair, defends the British against these charges.<sup>5</sup> The chief accusation against the British was that

<sup>1</sup> Compare Despagnet, p. 126, quoting a dispatch of Lord Methuen and the London *Morning Post* of Nov. 23, 1899. General De Wet states that he allowed his prisoners to retain their private property and never permitted it to be interfered with in his presence. *The Three Years of War*, p. 101.

<sup>2</sup> See General De Wet's defense in his *Three Years War*, p. 233. General De Wet says he never witnessed the practice of stripping "with any satisfaction." "Yet," he adds, "what could the burghers do but help themselves to the prisoners' clothing when England had put a stop to our imports and cut off all our supplies?" p. 101, N. 1.

<sup>3</sup> Spaight, p. 274.

<sup>4</sup> Despagnet, pp. 125-127, and Desjardins, *Revue des Deux Mondes*, March, 1900, p. 54.

<sup>5</sup> *Op. cit.*, p. 273.

unhealthy sites were chosen for the prison camps and that Boer prisoners were transported beyond the seas to Ceylon, St. Helena and Bermuda.<sup>1</sup> The latter policy was justified, says Spaight, by the "troubled and disaffected state of South Africa." He affirms that there is not "one tithe of evidence that the prisoners were ill-treated in anyway whatever" in the camps to which they were sent.<sup>2</sup> In connection with the treatment of prisoners it may be remarked that the British authorities at first adopted the practice of releasing on parole their Boer captives and offered them safe conducts to enable them to return to their homes, on condition that they would take an oath to abstain from further participation in the war. Many Boers took the oath, but did not hesitate to break it when they could do so with safety, pressure in some cases being brought to bear upon them to do so by the Boer commanders.<sup>3</sup>

<sup>1</sup> See the strictures of Despagnet, pp. 221-224.

<sup>2</sup> *Op. cit.*, p. 275. Mr. Hay, Secretary of State of the United States in a communication of October 16, 1900 to the American ambassador at London, referring to a report that a number of prisoners captured by British soldiers, among whom were 22 men claiming to be American citizens, had been deported to Ceylon, instructed him to inquire into the truth of the report. The secretary added: "If it be confirmed, the government of the United States could not view without concern the risk of life and health involved in sending any unacclimatized American citizens taken under the circumstances described, to so notoriously insalubrious a place as the Island of Ceylon. The principles of public law which exclude all rigor or severity in the treatment of prisoners of war beyond what may be needful to their safety, imply their non-subjection to avoidable danger from any cause." The ambassador was instructed in case the report was found to be true, to "represent the expectation of the American government that they be at once removed to some more healthful station." Moore, *Digest*, Vol. VIII, p. 225.

<sup>3</sup> Spaight, p. 294. In reality this was somewhat different from the release of prisoners on parole, since it was in the nature of an inducement to lay down arms. The Boer government did not recognize its validity and therefore considered that they were justified in compelling those who had taken it to return to the colors. Compare Bordwell, p. 147. See also General De Wet's justification of the conduct of the Boers in breaking their oaths, *Three Years War*, p. 159. It would seem that the English were scarcely justified in punishing those who were



Both the Boer and British military authorities exacted an oath of neutrality of the inhabitants of the territories which they occupied.<sup>1</sup> The oath required by the British authorities bound the persons subscribing to it not to take up arms against the British government and to remain quietly at home until the end of the war. Violation of the oath was severely punished. The exaction of this oath was severely criticized by continental writers who seem to have regarded it as an oath of allegiance (*fidélité*)<sup>2</sup> whereas it was not so in fact. It was merely an oath to remain neutral and its imposition upon the inhabitants of occupied territory is well within the right of an occupying belligerent.<sup>3</sup> It is in fact, the legal duty of the inhabitants to refrain from taking up arms during the period of occupation and the exaction of the oath did not add anything to their obligation. Article 45 of the Hague regulations forbidding pressure on the population of occupied territory to take an oath to the military occupant manifestly has reference to an oath of allegiance and not to an oath of neutrality.<sup>4</sup>

Another measure of the British authorities which evoked some criticism on the part of writers on international law was a proclamation formally annexing the Orange Free State in May, 1900, and declaring martial law therein. But the Orange Free State government had already earlier in the war proclaimed the annexation of a part of Cape Colony, which its forces had occupied, and pressure was used against wavering loyalists to

forced to break the oath, inasmuch as the British authorities were unable to protect them against compulsion. Compare Doyle, *op. cit.*, p. 79, and Bordwell, p. 148.

<sup>1</sup> Spaight, p. 372, and *Times History*, Vol. II, p. 293.

<sup>2</sup> For example by Despagnet, *op. cit.*, p. 214; and Merignhac, *Rev. Gén.*, 8, 111.

<sup>3</sup> Compare Spaight, p. 373, and Baty, p. 91, who considers that the oath for the abovementioned reasons was "unnecessary" and not of "any service."

<sup>4</sup> Despagnet, p. 216, appears to take a contrary view.

compel them to take up arms. Against this proclamation, Lord Milner protested, declared it null and void, and himself proclaimed a state of martial law in the territory thus annexed.<sup>1</sup> The British annexation of the Orange Free State was shortly followed by a proclamation of Lord Roberts warning the inhabitants that those who should be found in arms after a given date would be liable to treatment as rebels and to suffer in person and property accordingly.<sup>2</sup> Some weeks earlier General Pretorius, military governor of Bloemfontein, had issued a proclamation informing all burghers who did not surrender their arms that they would have their property confiscated. The President of the Orange Free State replied to this proclamation with a notice to the effect that every burgher who refused to fight against the English would be considered as a traitor and would be shot.<sup>3</sup>

The British annexation of the Orange Free State was attacked at the time not only by foreign writers on international law, but by prominent English statesmen like Sir William Harcourt and Mr. James Bryce, as being premature and unjustified, because the British occupation of the territory was by no means complete.<sup>4</sup> The proclamations threatening the inhabitants with treatment as rebels and the confiscation of their property were justifiable on the basis of the Hague convention and the customary law of nations only in so far as they applied to the inhabitants of territory under the effective military

<sup>1</sup> *Ibid.*, p. 145.

<sup>2</sup> Bordwell, p. 146; also Parl. Papers, 1900, Vol. 56, cd. 426.

<sup>3</sup> Despagnet, pp. 115, 214.

<sup>4</sup> Mr. Bryce criticized the proclamation as "monstrous" and "absolutely opposed to the first principles of international law." It was, he said, "a paper annexation—which purported to treat the inhabitants of the two republics as rebels." Quoted by Spaight, p. 331. Mr. Bryce was in error in speaking of the annexation of the "two republics." The Transvaal, in fact, was not annexed until September 1. The proclamation is also criticized by Spaight, p. 331; by General den Beer Poortugael in the *Revue des Deux Mondes*, Nov. 1, 1901, pp. 38 ff., by Bordwell, p. 144; and by Merignhac in 8 *Rev. Gén.*, pp. 93 ff.

occupation of the British forces. It may be doubted whether they were legally justified in certain parts of the Transvaal, for the occupation was not complete and as to the Orange Free State, over which the British had never asserted the right of suzerainty, the doubt is still greater.

The British policy of devastation was likewise criticized, as such a policy always is, however justifiable it may be on grounds of military necessity or expediency. But the *Times* justified the burning of private houses and farms by English cavalry in the Orange Free State in December, 1900, as a legitimate military operation.<sup>1</sup> English historians, however, were not lacking who condemned it.<sup>2</sup>

Early in 1901, Lord Kitchener inaugurated a system of devastation in the Transvaal which included the clearing of the country of horses, cattle, supplies, vehicles and the like. Spaight, an English writer, says it was carried out "with a systematic thoroughness that has seemed like barbarity to some," but he thinks that "it was amply warranted by the peculiar nature of the war."<sup>3</sup> The Hague Regulations (Art. 46) declare that private property must be "respected" and that it cannot be "confiscated," but they recognize the right to destroy private property where its destruction is "imperatively demanded by the necessities of the war." The policy of devastation has been frequently resorted to in former wars, but it has always been looked upon as a measure which is justifiable only in case of military necessity. But in the last analysis, belligerents are themselves the judges as to what military necessity permits or requires. The devastation of the Boer territories, like other similar acts in former wars, was denounced by the one side as cruel and unwarranted by the laws of war; on the

<sup>1</sup> Spaight, p. 112, and Despagnet, p. 227.

<sup>2</sup> *Times History*, Vol. III, p. 118.

<sup>3</sup> *Op. cit.*, pp. 136, 138. "A study of the history of the war," he says "will convince any impartial reader that there was no way of ending the struggle but that which the British commanders followed."

other side, it was defended as a legitimate military measure. Prior to the adoption of the policy of devastation, a large number of Boer farms had been burned by the British as a punishment for violation of the laws of war, principally because the houses had been used as cover for snipers and for similar purposes. Later the policy of burning houses and farms in the neighborhood of places where trains had been wrecked or railways or telegraph lines had been destroyed was adopted. On June 16, 1900, Lord Roberts issued a proclamation in which, adverting to the destruction of railway bridges and the cutting of telegraph wires by "small parties of raiders," he warned the inhabitants that they would be held responsible, that the houses in the vicinity of the place where the damage was done would be burnt and the principal civil residents would be made prisoners of war. Three days later this was followed by another proclamation, providing, in addition, for the imposition of a pecuniary penalty to be levied on each farm and for the placing on the railway trains of one or more residents of the district, with a view to deterring the inhabitants from attempting to wreck the trains.<sup>1</sup> This expedient had been employed with success by the Germans in France in 1870-71. Finally, a third reason was assigned as a justification for the burning of houses and farms, namely the violation by the Boers of the oaths of neutrality which they had taken. The burning of the Boer farms invoked much criticism and was denounced in many quarters as contrary to the Hague regulations and the customary

<sup>1</sup> Text of the proclamation in Parl. Papers, 1700, Vol. 56 (cd. 426), pp. 10-11, and Bordwell, p. 149. As to the practice and the legitimacy of this expedient, see the discussion in my *International Law and the World War*, Vol. I, pp. 306 ff. Mr. Bryce in the House of Commons criticized this expedient as "contrary to the Hague Convention and the general usages of civilized warfare," but it was defended by Mr. Brodrick, secretary of state for war. Writers on international law have generally condemned such measures. They are even condemned by the British Manual of Military law, for the reason that it "exposes the lives of innocent inhabitants not only to the illegitimate

laws of civilized warfare.<sup>1</sup> Some of it was justifiable as in the case of farm houses which were used as covers for snipers and particularly those from which white flags were flying.

The legitimacy of the burning of houses and farms in the neighborhood of places where railway or telegraph lines were injured or trains wrecked, depended upon whether the territory was under the effective military occupation of the British and if so, whether the community as such could properly be held responsible for the acts complained of. If the territory was not effectively "occupied" in the sense in which the term is understood in the law of military occupation, the Boers had a right to destroy the railway and telegraph lines; otherwise they paid not. In the latter case, however, the British authorities were not within their rights in holding the community responsible by burning houses or farms away from the scene of the acts complained of, and which were not being used as covers for unlawful acts by individual Boer soldiers, unless the community was really responsible, either by direct participation or

acts of train wrecking by private enemy individuals but also to the lawful operations of raiding parties of the armed forces of the belligerent" (p. 306). The legality of train wrecking by inhabitants would seem to depend on the status of the territory in which such acts are committed. If the territory is under the effective military occupation of the enemy, they have no right to commit such acts, for they are bound to obey the authority of the military occupant. But if hostilities are still going on in the territory, the regular armed forces of the enemy have a right to destroy the railroads, though the civil population have not. If such acts are committed by the civilian population in occupied territory it would seem that the placing of persons on the trains to deter them from it is unobjectionable. Compare Spaight, *Op. cit.*, p. 467.

<sup>1</sup> The number reported as having been burned between June, 1900 and January, 1901 was 634. Parl. papers, 1901, Vol. 47, cd. 524 cited by Bordwell, p. 148. Sir A. Conan Doyle states that of these 634 buildings "which we know to have been destroyed, more than half have been used by snipers or in some other direct fashion have brought themselves within the laws of warfare." *op. cit.*, p. 92.

In connection with the matter of farm burning it may be remarked here that at the close of the war, the Boers were compensated by Great Britain for the losses which they had sustained on account of the destruction of their crops and the burning of their farms.

through approval and sympathy.<sup>1</sup> The Hague regulations (Art. 50) limit collective responsibility to acts for which the inhabitants are "solidly responsible" and this rule is incorporated in the British Manual of Military Law (Art. 385). They cannot justly be held collectively responsible for isolated individual acts of which they knew nothing and which the authorities could not have prevented.<sup>2</sup> That would be to hold the public authorities responsible for the perfect enforcement of the laws, something which no community has ever in fact been able to insure. As to the burning of the houses and farms of Boers who had taken and violated an oath of neutrality, it would seem that those who had been persuaded or terrorized by the Boer authorities into breaking their oaths hardly deserved to be punished by the British. There is a difference of opinion as to whether the Boer governments did not violate Article X of the Hague regulations which forbids a government from requiring or accepting of its soldiers any service which is incompatible with their paroles given.<sup>3</sup> But admitting that the action of the Boer Governments was not justified, the case of the men was different. They took the oaths with the understanding that they would be protected by the British authorities and this protection was not given, so that they were placed in the position of being compelled to violate their oaths or of being shot by their

<sup>1</sup> Lord Roberts asserted in his proclamation of June 16, 1900, that the destruction of the railway lines "could not have been done without the knowledge and connivance of the neighbouring inhabitants and the principal civil residents in the districts concerned." If that were true, the extension of the doctrine of collective responsibility to such cases was not contrary to the Hague regulations.

<sup>2</sup> I have discussed the whole subject of collective responsibility more at length in my *International Law and the World War*, Vol. II, Ch. 26, especially pp. 156 ff.

<sup>3</sup> Bordwell (p. 147) holds that, since the oaths taken were not in the nature of prisoners' paroles the action of the Boer governments in compelling them to go "on commando" again was justifiable. Doyle, on the other hand, thinks they committed a "very clear breach" of Article X of the Hague regulations, *op. cit.*, p. 91.

own countrymen. For this reason it would seem that the burning of the houses of such men because they were "on commando" was a measure of extreme severity.<sup>1</sup>

Whatever may have been the strict rights of the British commanders in regard to farm burning, the policy evoked such strong protest in England and elsewhere that it was largely abandoned in November 1900, when Lord Roberts issued a proclamation announcing that in the future no farm would be burnt except for acts of treachery, or firing upon troops therefrom or as a punishment for injuring railway or telegraph lines and then only could it be done with the direct consent of the commanding officer given in writing. No house was to be burned because the owner was absent "on commando." Thereafter the number of farms burned was relatively small.

Having, by the abovementioned measures of devastation and farm burning, left a considerable part of the Boer population in a state of destitution, the British authorities were obliged by considerations of humanity to provide for their support. Instead of sending the women and children back into the Boer lines or turning them adrift, as Sherman did at Atlanta, the British authorities gathered them together in concentration camps or camps of refuge, where they were fed and otherwise provided for.<sup>2</sup> General Botha vigorously protested against the measure as one of "revenge against the women and children

<sup>1</sup> So argues Sir A. Conan Doyle, *op. cit.*, p. 92. See also the criticism by Bordwell (p. 146) who points out the injustice of punishing as rebels those against whom there was no charge except being "on commando." General De Wet (*Three Years War*, p. 159) justifies the conduct of the Boers in breaking their oaths, on the ground that the British authorities failed to protect the persons and property of those who took the oath, and that many of them were heavily fined because railway and telegraph lines were damaged and their cattle were requisitioned at prices below their value. In short, the English "broke their contract" with those who had taken the oath and this released them from all obligation to obey it.

<sup>2</sup> By the end of the year, 1901, the number of persons in the camps amounted to more than 100,000. Doyle, p. 82.

for the conduct of their governments in continuing the struggle and as one which was contrary to all the principles of a war between civilized peoples and as being extremely cruel." Mr. Chamberlain denied that there was any purpose of revenge or extermination, but that the measure was founded upon considerations of humanity and was, in fact, an act of mercy. There were many complaints concerning the conduct of the camps and particularly, because of the very high rate of mortality, the existence of which Mr. Chamberlain readily admitted and deplored, although he asserted that nothing which money or science could do to reduce it had been spared. This was due in part to unwise selection of the camp sites, to insufficient medical and sanitary facilities in the beginning, and to the habits of the refugees themselves. Whatever may be said of the actual administration of the concentration policy it would seem that in principle, it was one which humanity required. As to the legitimacy of the British measures which made it a necessity, however, there is more ground for a difference of opinion.<sup>1</sup>

The policy of the British authorities did not stop with the measures described above. On the 8th of August, 1901, Lord Kitchener issued a proclamation in which he announced that all prominent burghers of the two republics who did not surrender by the 15th of September following, would be banished forever from South Africa and that the cost of supporting their families would be recoverable from their property. This measure was severely criticized, among others by Sir William Harcourt in the House of Commons, as being contrary to the

<sup>1</sup> As to the concentration camps, see Spaight, *op. cit.*, pp. 308 ff., and 376 ff.; Bordwell, *op. cit.*, pp. 151 ff.; Doyle, *op. cit.*, pp. 94 ff.; Despagnet, *op. cit.*, pp. 369 ff.; and Merignhac, *Rev. Gén.* 8 : 105 ff. See also Parl. Papers, 1902, Vol. 69, cd. 1329. The concentration policy and especially the conditions prevailing in the camps was the subject of much criticism in England by Mr. John Morley and others but it was defended by Doyle and Spaight.



laws of war (Art. 46 of the Hague regulations) and to the declarations of the English delegates at the Hague Conference in support of the right of the inhabitants to take up arms and resist by all legitimate means an invading enemy.<sup>1</sup> It was defended by Mr. Chamberlain, however, on the ground that the contest on the part of the Boers had ceased to be a regular war with any prospect of success for them, that it had degenerated into a hopeless and irregular guerrilla struggle, for the prolongation of which the Boer leaders were responsible and that, in consequence, their property was properly chargeable with the expense involved in maintaining their families in the concentration camps. In short, the Boer forces were no longer entitled to be recognized as having full belligerent rights.<sup>2</sup> The threat of banishment however, does not appear to have been carried out in any case, though a considerable amount of landed property belonging to the Boer leaders was sold in pursuance of Lord Kitchener's proclamation. Regarding the legitimacy of the measure adopted by Lord Kitchener, it is not easy to see how the Boer commanders were guilty of any breach of the laws of war in continuing the struggle so long as in their judgment there was any hope of success, and the prosecution of the contest by means of guerrilla operations was not unlawful so long as the Boers complied with the rules of the Hague convention relative to the status of lawful combatants. The confiscation of their property because they refused to abandon the struggle was not, therefore, permissible under Art. 46 of the Hague regulations.<sup>3</sup> If, however, the Boer forces had degenerated into bands of marauders and bandits, as Mr. Chamberlain contended they had, the case was different.

From a consideration of the interpretation and application of the laws of war by the contending belligerents, we turn now

<sup>1</sup> Despagnet, p. 350.

<sup>2</sup> See Lord Kitchener's defense of the proclamation in *Parl. Papers*, 1902, Vol. 69 (cd. 1096), p. 9 : also Bordwell, *op. cit.*, p. 155.

<sup>3</sup> Compare Spaight, p. 377.

to an examination of the relations between the belligerents on the one side and neutral powers on the other. As soon as the British government manifested its intention to regard the conflict with the Boer republics as an international war, neutral powers were obliged to put into effect their neutrality laws, and the belligerents on their part were obliged to conform their conduct to the requirements of the law governing the relations between belligerents and neutrals. Neutral markets were open to both belligerents for the purchase of munitions and other supplies, but owing to the geographical isolation of the South African republics, Great Britain alone was able to avail of those markets. From Germany and Austria, in particular, the British Government purchased quantities of artillery,<sup>1</sup> and from the United States, thousands of horses and mules and large quantities of other supplies. There was some complaint on the part of the Boer governments that this one-sided assistance was unfair and a remonstrance was addressed to the American Secretary of State through the Orange Free State minister at the Hague, complaining that the shipment of war materials on so large a scale from the United States to Great Britain was contrary to the law of nations. The Secretary of State replied on December 15, 1899, to the effect that the law of the United States in regard to the matter was well settled and that the practice was supported by the opinions of eminent authorities on international law. Under the circumstances, therefore, he did not consider that it was necessary to go into the question of the facts alleged in regard to shipments from the United States.<sup>2</sup> The governments of Germany and Austria whose situation in consequence of the allied blockade during the World War was somewhat similar to that of the Boer republics, protested in 1915 for the same reason against the furnishing of war supplies on a large scale by the

<sup>1</sup> Spaight, *op. cit.*, p. 478.

<sup>2</sup> Mr. Hay to Mr. Pierce, Moore, *Digest*, 7, 969.

United States to the belligerents on one side when those on the other were cut off from such sources. Neither the practice of the past nor the authority of jurists and text writers, however, was in favor of the contention put forward by the Boers in 1899 and by the Germans and Austrians in 1915. Much might be said in favor of a change in the practice when one belligerent is entirely cut off from outside supplies, but its legitimacy is so well settled by practice and too generally approved to be contested.<sup>1</sup> The enormous scale on which British agents purchased horses in the United States for shipment to South Africa provoked some complaint and caused a resolution to be adopted by the House of Representatives calling on the President to furnish information as to whether the ports and waters of the United States had been used for the exportation of horses, mules and other supplies for use in South Africa, and if so, what steps had been taken to prevent such use thereof. It was charged that a British remount depot had been established in Louisiana for the purchase of horses and mules, and that the port of New Orleans was being made the "basis of military operations" for the exportation of military supplies for the British army in South Africa. The report submitted, in response to the resolution, stated that between Oct. 1899 and Jan. 31, 1901, the value of such shipments amounted to \$26,592,692 and that no steps had been taken to permit the "lawful exportation" of such supplies.<sup>2</sup> The purchases appear to have been made by British agents, though the actual loading of the supplies was done by citizens of the United States under the supervision of British agents. The spirit, if not the letter of the American

<sup>1</sup> The opinion and practice are discussed at length in my *International Law and the World War*, Chap. 35, in connection with the complaint of Germany and Austria referred to above.

<sup>2</sup> Considerable quantities of such supplies were also purchased by British agents in other countries, notably in Hungary, Spain, Italy and the Argentine Republic. See report of the British Royal Commission on the War in South Africa, Ses. Papers of the House of Commons, cd. 1792 (1903), p. 260.

neutrality laws appears to have been violated but a federal court at New Orleans held that there was nothing in the principles of international law or in the treaty of Washington to prohibit citizens of the United States from selling supplies to a belligerent. No steps were taken to interfere with the traffic, though it is not improbable that if the Boers had triumphed in their war with Great Britain they would have had some basis for a claim for an indemnity against the United States.<sup>1</sup> In general, the European powers observed the requirements of the law of neutrality. Some charges appear to have been made by the British government that the Boers recruited their forces in Europe and it is true that a goodly number of Europeans and some Americans voluntarily joined the Boer armies but they did so as individuals and there was no fitting out of military expeditions in any neutral country.

Portugal was in a position somewhat different from that of other neutral powers by reason of the proximity of Portuguese East Africa to the South African republics and the possession in Lorenzo Marques of a seaport only fifty miles from the Transvaal frontier, which served as the only port of entry for the Boer republics. But being a neutral port it could not be lawfully blockaded by the naval forces of Great Britain and this proved to be a source of considerable concern to the British government which charged that a constant stream of war supplies poured into the South African republics through this port which, it was asserted, became the headquarters of Boer agents of every description. It was the duty of the Portuguese government not to permit the port to be used for this purpose. At first it did little to interfere with the contraband traffic which went on through the port, but under pressure from the British government, it later adopted measures more in accord with the strict requirements of the law of neutrality.

<sup>1</sup> The whole matter is discussed at length by Campbell in his *Neutral Rights and Obligations in the Anglo-Boer War*, pp. 23-46.

One act of the Portuguese government, which has been severely criticized by writers on international law was the permitting of English troops to land at Beira and march across Portuguese territory to Rhodesia. The matter of the passage of troops through neutral territory was not dealt with by the Hague Convention of 1899,<sup>1</sup> but since the middle of the nineteenth century it had been a recognised customary rule of international law that a neutral could not grant the right of passage to the troops of a belligerent. It happened, however, that there was a treaty between Great Britain and Portugal concluded in 1896 by which Portugal engaged to permit the free passage of "persons" and "merchandise" across the territory of Portuguese East Africa. It was argued, therefore, that while under ordinary circumstances Portugal could not grant the right of passage, it would be no violation of the law of neutrality to grant it in pursuance of a treaty such as that of 1896, concluded prior to the war and which did not contemplate war. Some of the older authorities had recognized the right of a neutral to allow passage to belligerent troops in such a case, but practically all later writers had denied it. Moreover, it would seem clear enough from the history, spirit and phraseology of the treaty of 1896 that it had reference to the right of commercial transit of persons and merchandise only in time of peace and not at all to the transportation of troops in time of war. The interpretation put upon the treaty was therefore unduly strained and unwarranted. The consensus of juristic opinion at the time was, and is now, that Portugal had no right to grant the permission requested and that Great Britain had no right to demand it. The law of neutrality as it stood at the time was, therefore, clearly violated.<sup>2</sup>

<sup>1</sup> Such passage was forbidden, however, by the Convention of 1907 respecting the rights and duties of neutral powers (Arts. 2 and 5).

<sup>2</sup> The matter is discussed by Campbell, *op. cit.*, pp. 64 ff.; by Batty, *op. cit.*, Ch. 3; by Spaight, *op. cit.*, p. 48; by Despagnet, *op. cit.*, p. 244 ff.; and in *Times History*, Vol. IV, pp. 364 ff. I have reviewed the

While, as stated above, Great Britain could not lawfully blockade Lorenzo Marques because it was a neutral port, she might by application of the doctrine of continuous voyage intercept the transportation of oversea supplies to the Boers through this port provided they were contraband of war. France had applied the doctrine during the Crimean war;<sup>1</sup> the United States had done likewise during the Civil War;<sup>2</sup> and so had Italy a few years earlier (1896) in its war with Abyssinia,<sup>3</sup> and in the same year it was approved by the Institute of International Law. But Great Britain had uniformly opposed the doctrine and while it refrained from formally protesting against the American practice during the Civil War, it was well known that it did not approve the American application of the rule. In 1885, when the French government announced its intention of seizing neutral vessels carrying contraband to the English port of Hong Kong, whenever it could be shown that the ultimate destination of the goods was the armed forces of China with which France was then at war, the British government vigorously protested and maintained that trade between neutral ports could not be interfered with. English writers on international law, almost without exception

opinion of the authorities on the question in my *International Law and the World War*, Vol. II, pp. 221-24. Practically all writers on international law have condemned the action of Portugal as contrary to the laws of neutrality. The government of the Transvaal notified the Portuguese government that it would regard the passage of British troops through Beira as tantamount to an act of hostility on the part of Portugal and when the act had been consummated it protested, though without effect.

<sup>1</sup> See the case of the *Frau Anna Houwina*, discussed by Calvo, *Droit International*, Vol. V, secs. 1961, 2767.

<sup>2</sup> See the cases of the *Dolphin*, the *Pearl*, the *Bermuda*, the *Stephen Hart* and the *Springbok*, discussed by Elliott in the *Amer. Jour. of Int. Law*, Vol. I, pp. 61 ff., and by Woolsey, *ibid*, Vol. IV, pp. 823 ff.

<sup>3</sup> Notably in the case of the *Doelwick*, a Dutch ship captured by an Italian cruiser while bound for the French-African port of Djibouta. Discussed by Brusa in 4 *Rev. Gén.*, p. 157, and by Fedozzi in 29 *Rev. de Droit Int.*, pp. 49 ff.

had condemned the doctrine of continuous voyage. Still more recently, during the Chino-Japanese War (1894) the British government had protested against the seizure and search by a Japanese cruiser of the British mail steamer *Gaelic*, bound from the neutral port of San Francisco to the British port of Hong Kong and which the Japanese suspected of having contraband on board ultimately destined for the use of the Chinese forces. The British protest was based on the principle that since the vessel was bound for a neutral port it was not liable to search and that it was immaterial whether the ultimate destination of the cargo was a Chinese port.<sup>1</sup> In the face of this practice and juristic authority, how could the British government now claim and assert a right to interfere with trade between neutral ports? On the other hand, could it stand aside and see a stream of war supplies from over the seas pour into the port of Lorenzo Marques and after a brief halt be forwarded overland to the Boer armies which were hardly a hundred miles distant? In these circumstances, the British government did what belligerents have usually done before and since, and what they are likely to do in the future. It proceeded to stop and search neutral vessels bound to the port of Lorenzo Marques, whenever they were suspected of having on board war supplies which were believed to be intended for the armed forces of the enemy. In December,

<sup>1</sup> The case is discussed by Westlake in the *Law Quarterly Review*, Vol. XV (1899), pp. 24 ff., reprinted in his *Collected Papers*, pp. 461 ff. See also Takahashi, *International Law During the Chino-Japanese War*, pp. xvii ff. Professor Westlake in his article sets forth the English view of the doctrine of continuous voyage. "Goods on board a ship destined to a neutral port," he says, "may be consigned to purchasers in that port or to agents who are to offer them for sale there, in either of which cases what further becomes of them will depend on the consignee purchasers or on the purchasers from the agents. Such goods before arriving at the neutral port have only a neutral destination; on arriving there they are, in the language of Lord Stowell, 'imported into the common stock of the country'; if they ultimately find their way to a belligerent port or to a belligerent army or navy, it will be in consequence of a new destination given them."

1899, soon after the outbreak of the war, three German steamers, the *Bundesrath*, the *Herzog* and the *General* were seized on the suspicion that they carried ammunition intended for the Boers and also a number of passengers who were believed to be volunteers for service in the Boer army. The ships were thereupon taken to Durban with the intention that they should be put in the custody of a prize court. The German government promptly and vigorously protested against the seizures. No contraband being found in their cargoes, they were released and subsequently the British government paid an indemnity to the owners of the vessels and to the consignees of the cargoes for the losses which they had sustained on account of the detentions.<sup>1</sup> During the controversy the German government

<sup>1</sup> The seizure and detention of several ships, notably the *Maria*, (a Dutch vessel) and the *Mashona*, *Beatrice* and *Sabine* (which turned out to be British ships) carrying cargoes of American flour, meat, grain, etc., consigned to Lorenzo Marques, elicited the protest of the Dutch and American governments, both of which denied that the doctrine of continuous voyage could be applied to the transportation of foodstuffs between neutral ports. The British government admitted that the foodstuffs with an ultimate hostile destination were not liable to be treated as contraband, unless they were intended as supplies for the enemy's forces and that it must be shown that they were really intended to be so used and not merely capable of being used. Since, however, the three last mentioned vessels were *British* ships, they were liable to seizure for trading with the enemy. In short, it was not a question of contraband, but of trading with the enemy and the British government had a right to seize the vessels of its own subjects for violating a municipal statute. The *Maria* being a neutral vessel the British government purchased the cargo and paid the owners of the vessel an indemnity on account of its detention. As to the American cargoes on the three British ships, the American government insisted that they should be delivered to the consignees at the port of destination since they were not liable to seizure and that the owners should be indemnified for the losses sustained on account of the detentions. The British government was willing to purchase the cargoes but it denied any liability for damages since the detentions were merely incidental to the seizures which were fully warranted. In the end the British government purchased the goods but asserted that it was done purely *ex gratia* and that it admitted no liability to purchase them or make compensation for losses sustained. The American government, on the other hand, denied throughout the controversy that foodstuffs under such circumstances were liable to seizure. The final settlement of the controversy left the question of



took the position that even if there had been any war supplies aboard the ships, Great Britain would have had no right to seize or interfere with them, because trade between neutral ports is free. Indeed, it argued, such goods could not have been contraband for the reason that no goods can be contraband so long as they are being transported from one neutral port to another. The British government, however, declared that it was unable to "accede" to this contention. It denied that Great Britain had ever protested or raised any claim against the decision of the United States Supreme Court in the case of the *Springbok*, nor had it ever expressed any dissent from that decision. As to the German argument based on the rule laid down in the British Manual of Naval Prize Law that the destination of a vessel shall be considered neutral, if both the point to which she is bound and every intermediate port at which she is to call in the course of her voyage, be neutral. Lord Salisbury replied that the Manual was not to be considered as an exhaustive or authoritative statement of the views of the British government but was only a general statement of the principles by which British naval officers were to be guided in their duties. The British government now, for the first time, squarely maintained that contraband goods consigned or intended to be delivered to an enemy agent at a neutral port, or if destined to the enemy's country, were liable to seizure and confiscation.<sup>1</sup> Even foodstuffs destined for the enemy's government or agents, if especially adapted for use as rations for troops, were equally liable to seizure as contraband.<sup>2</sup> The issue of the controversy

principle undetermined. It was destined to come up again during the World War. The controversy between the American and British governments regarding the seizures is fully detailed in Campbell, *op. cit.*, Ch. 4.

<sup>1</sup> Professor Holland who had long been an opponent of the doctrine of continuous voyage, defended its extension to the above mentioned cases as "an innovation which seemed to be demanded by the conditions of modern commerce." Letter to London *Times*, Jan. 2, 1900, *Letters on War and Neutrality*, p. 146.

<sup>2</sup> The whole matter of contraband and continuous voyage during the Boer war is fully discussed by Campbell, *op. cit.*, Ch. IV. See also

left the matter in a somewhat uncertain state. On account of the vigorous opposition of Germany to the application of the rule of continuous voyage to trade with Lorenzo Marques, no further seizures of neutral vessels were made. On the other hand, the British government had upheld with equal vigor its claim to intercept the carriage of contraband between neutral ports when it was ultimately destined to the enemy. It was clear that if the German contention, that there can be no such thing as contraband trade between neutral ports, were admitted without qualification, the right of a belligerent to prevent the carriage of contraband to his enemy would be of little value in the case of a land-locked enemy which is free to draw his war supplies through a nearby neutral port. Unless therefore, a belligerent were allowed to apply the doctrine of continuous voyage or ultimate destination to the transportation of contraband to such a port, an enemy without a sea port of its own might be better off than if it had one. It was to meet such a situation as this that the code of prize law framed by the London Naval Conference of 1908-09 allowed the rule of continuous voyage to be applied to the carriage of conditional as well as absolute contraband to a belligerent which has no sea board.

In conclusion, it may be said, by way of review, that the conduct of the war was characterized by undoubted violations of the Hague conventions and the customary laws of warfare. Neither belligerent was guiltless in this respect. Generally, the charges of non-conformity to the law were either denied outright by the belligerent against whom they were directed or an attempt was made to justify them on the ground of military necessity or as legitimate acts of reprisal against the enemy for having committed similar violations. In some cases also the party accused interpreted the law as permitting the acts complained of. This has been the history of every war. Writers are not lacking who

have attempted to justify the lapses of the Boers while condemning the conduct of the British forces, on the ground that Great Britain was bound by the Hague Conventions while the Boer governments were not, and also for the reason that the English troops were more largely trained professional soldiers of a highly civilized state and who might be assumed to have been fully cognizant of the requirements of the laws of war, whereas the Boers were untrained, improvised soldiers, mainly peasants from whom strict conformity to the laws of war with which they were unfamiliar, could hardly have been expected. Moreover, the Boers felt that they were fighting an enemy who had unjustly invaded their country; they were engaged in defending their homes and firesides, and that if, in consequence, they sometimes overstepped the limits of the law, their acts, under these circumstances, were entitled to be judged with leniency.<sup>1</sup> In this, as in every war since that time, there were new interpretations and applications of the law of nations; new instruments were employed and new methods adopted with which the law did not fully deal. The doctrine of continuous voyage was attempted to be applied by Great Britain for the first time, under circumstances which justified it, if it can be justified at all, but it provoked, as it always has, the vigorous opposition of neutrals. As applied to a state having no seaport, it was not authorized by the Hague Conventions of 1899, but it has since found its way into the law of nations and will no doubt be applied under like circumstances in the wars of the future. The rights of military occupants were pushed to the limit and the doctrine of collective responsibility, in particular, was given an extension in some cases which was hardly conformable to the spirit of the Hague Conventions. But this has been true of every war since 1899 and is likely to be true of future wars.

Although the Hague Conventions were undoubtedly violated by both belligerents as they have been in all subsequent wars

<sup>1</sup> Compare on this point, Despagnet, *op. cit.*, p. 103.

and will be in those yet to come, it would be going too far to assert that they exerted no influence upon the conduct of the belligerents in the Boer War. In more than one instance they were invoked by one party in its protest against the acts of the other and there is evidence to support the belief that they exerted a restraining effect upon commanders and troops of both belligerents throughout the war. Their machinery and processes failed to prevent the outbreak of the war or to shorten its duration as they have usually done, but that they prevented excesses, the employment of objectionable instrumentalities and the adoption of uncivilized methods there can be little doubt.

## II

### THE RUSSO-JAPANESE WAR.<sup>1</sup>

Within two years after the termination of the South African conflict, war between Russia and Japan broke out in the far east. It was the first conflict in which both belligerents were parties to the Hague Convention of 1899 relative to the laws and customs of war on land. It therefore afforded the first opportunity for observing the application of the Hague regulations by belligerents both of which were bound by their prescriptions and for evaluating their merits and shortcomings. Unlike the Boer War, the Russo-Japanese war was not waged exclusively on land, but was both a continental and a maritime struggle and as such it revealed a regrettable lack of conventional rules for the conduct of maritime war. It demonstrated, therefore, the desirability of a new conference to formulate a body of rules for the Regulation of the conduct of naval war.<sup>2</sup>

The methods recommended by the first Hague Conference in its convention for the pacific settlement of international

<sup>1</sup> Among the more important treatises dealing with questions of international law in the Russo-Japanese War may be mentioned: Ariga, *La Guerre Russo-Japonaise au point de Vue Continental et le Droit International* (1908); Asakawa, *The Russo-Japanese Conflict*; Hershey, *International Law and Diplomacy of the Russo-Japanese War* (1906); Lawrence, *War and Neutrality in the Far East*, (1904); Ninakawa, *Kuroki's Army and International Law*; Smith and Sibley, *International Law as Interpreted During the Russo-Japanese War* (1907); Takahashi, *International Law Applied to the Russo-Japanese War* (1908); and Wagmann, *Der Ostasiatische Krieg und das Völkerrecht* (1905). There is also a very extensive periodical literature on the subject, particularly in the *Revue Général de Droit International Public* and in the *Revue de Droit International et de Législation Comparée*, to some of which references are made below. A very complete bibliography is given by M. Francis Rey in the *Revue Général*, Vol. 16 (1909), pp. 481-85.

<sup>2</sup> Compare on this point M. Rey, in 12 *Rev. Gén.*, p. 217.

disputes, for preventing recourse to war, proved entirely ineffective to avert the conflict between Russia and Japan. Neither party made any proposal looking toward the settlement of the dispute by arbitration. In the main, the dispute did not fall in the category of justiciable controversies. It may be remarked, however, that among the incidental questions at issue between the parties there were claims involving the interpretation and application of treaties, that is, questions of a legal character for the settlement of which the Hague Conference had recommended recourse to arbitration. Thus Japan had reproached Russia for her policy in Manchuria, for having violated her treaty engagements to respect the territorial integrity of China and for having violated certain rights to which Japan was entitled under her treaty of October 8, 1903, with China. For the settlement of controversies such as these the Hague Convention (Art. 16) had declared arbitration to be the "most effective and at the same time, the most equitable means." But these differences were only subsidiary to the main dispute, which was essentially political and not juridical. To Japan it was necessary to her "independence" that Russian influence in Manchuria should be checked and that her own domination in Corea should be preserved.<sup>1</sup> In the Japanese declaration of war against Russia, it was asserted that the "integrity of Corea was essential to the safety of the realm" and that the "vital interests" of the Empire were "menaced" by the Russian policy.<sup>2</sup> Thus interpreted, the main issue was not arbitrable and the Hague Convention created no obligation on the part of Japan to propose or accept this mode of settlement.<sup>3</sup>

<sup>1</sup> Compare on this point Rey, in 13 *Rev. Gén.*, p. 609.

<sup>2</sup> Text in Takahashi, p. 7.

<sup>3</sup> Nevertheless there were peace advocates, like Mr. Stead in England, who proposed a popular petition to the Czar and the Mikado urging them to submit the dispute to the Permanent Court of Arbitration at the Hague.

Arbitration being out of the question there remained recourse to good offices and mediation in accordance with the recommendation of the Hague Conference. Unlike arbitration this mode of settlement was applicable to all differences, political as well as legal, even to those which involved the "independence," the "vital interests" and the "national honor" of the parties. But this last resource also failed. Neither party acted in accordance with article 2 and invoked the mediation of a friendly power, doubtless because "circumstances" did not permit it, nor did any third power offer its good offices or mediation in accordance with article 3, because there was no reason to believe that the offer would be looked upon favorably by either party. In fact Japan appears to have made it known that she would not accept the mediation of any power. Various peace societies however, made *démarches* before third powers to induce them to offer their mediation, but without effect.<sup>1</sup> It is a matter of regret that neither Russia nor Japan showed any disposition to settle their differences by any of the pacific means recommended by the Hague Conference, but they acted entirely within their rights, since the recourse recommended was purely facultative and in no sense obligatory. They refused to do what states have generally refused to do before and since, and they can hardly be reproached for having taken the position that the controversy could only be settled by recourse to arms. Happily, however, while good offices and mediation proved ineffective to prevent the outbreak of the war, they were later employed with success by President Roosevelt in bringing

<sup>1</sup> Thus in December, 1903, the International Permanent Bureau of Peace laid before the ministers of foreign affairs of all the states signatory to the Hague Convention, a memoir soliciting the mediation of the powers. The English and French parliamentary groups of arbitration also addressed to their respective governments urgent appeals in favor of conciliatory action. In the Congress of the United States representative Slayden presented a motion requesting the President to tender his good offices for mediation between Russia and Japan. See Rey, 13 *Rev. Gén.*, p. 610.

about its earlier termination though in fact it came only after the defeat of Russia had virtually been accomplished.<sup>1</sup>

The war between Russia and Japan was peculiar in that the actual hostilities took place almost entirely outside the territories of the two belligerents. With the exception of the Japanese expedition organized in the island of Sakhalin toward the end of the war, and the attacks against Vladivostok, the war, so far as it was waged on land, took place in neutral territory (Corea and China), in territory leased by China to one of the belligerents (Port Arthur and Liao-Tung) and in territories constituting foreign concessions made by China and Corea. As to the status of Corea at the beginning of the war, however, there was some doubt and much controversy. By the treaty of peace of 1895 between China and Japan, the former power had been compelled to recognize "the full and complete independence and authority of Corea" and by the treaty of alliance of 1902 between Great Britain and Japan, both signatories mutually recognized the independence of both Corea and China. It would seem, therefore, that when the Japanese troops landed in Corea early in February, 1904, and Japanese warships attacked a Russian war vessel in the Corean harbor of Chemulpho, Japan violated the territory of a neutral state. The commanding officers of the British, French and Italian warships lying in the harbor so regarding it, addressed a joint protest to the Japanese admiral in which they declared that Chemulpho was in accordance with the recognized rules of international law, the port of a neutral country and that no power had a right to attack the vessels of another power lying in that port.<sup>2</sup> Lawrence, who undertook to justify the acts of the Japanese, admits that there was some technical ground for the accusation that Japan had violated the territory of a neutral state, but he asserts that in fact Corea had never been and was

<sup>1</sup> I have further discussed this matter in Lecture XI.

<sup>2</sup> Text of the protest in Lawrence, *op. cit.*, p. 76.



never intended to be a fully independent state and that its neutrality was a mere "state paper neutrality." <sup>1</sup> Japan, on her part, replied to the Russian denunciation of the act as a "dastardly attack" in violation of treaties and the fundamental rules of international law, by alleging that her troops had been sent to Corea with the consent of the Corean government for the purpose of maintaining the independence and territorial integrity of the country against the aggressions of Russia. The Japanese believed, or professed to believe, that the Russians intended to land troops there and their own action was merely to forestall the Russians. Corea having thus consented to the landing of the Japanese troops, Chemulpho had ceased to be a neutral port and consequently the attack upon the Russians in the waters thereof was no violation of international law.<sup>2</sup> Whatever may be the facts as to Corea's giving her consent to the landing of Japanese troops, the situation was "regularized" by the conclusion on February 23, some days after the formal declarations of war had been made, of a treaty between Japan and Corea by which Japan agreed to guarantee the territorial integrity of Corea and to this end Japan was to be allowed to occupy with her military forces such parts of the country as she

<sup>1</sup> *Ibid*, pp. 208 ff. This is likewise the view of the French professor, Rey (art. cited pp. 162-163) who remarks that Corea was in fact deprived of her independence by Japan and Russia, and being too weak to compel the respect for the neutrality, which she proclaimed, at the outbreak of the war, she was never after the beginning of hostilities a neutral power.

<sup>2</sup> The whole question of the legal status of Corea at the date of the landing of the Japanese troops is ably discussed by Rey, in 15 *Rev. Gén.*, pp. 151 ff. See also Nagaoka, in the *Revue de Droit Int. et de Lég. Comp.*, Vol. VI, 1904, pp. 492 ff.; Ariga, *op. cit.*, Ch. 2; Gaborit, *Questions de Neutralité Maritime Soulevées par la Guerre Russo-Japonaise*, pp. 67 ff.; Lawrence, *op. cit.*, Ch. 10; Smith and Sibley, *op. cit.*, Ch. I; and Spaight, *War Rights on Land*, p. 481. The Japanese view of the status of Corea is discussed and maintained by the Higher Prize Court of Japan in the case of the *Ekaternoslav*, a Russian vessel captured by the Japanese in the territorial waters of Corea on Feb. 6. Text of the decision in Takahashi, pp. 587 ff.

judged proper.<sup>1</sup> In signing this treaty, Corea renounced her neutrality in the war and became a virtual ally of Japan. Russia considering that the treaty was null and void because it was imposed upon Corea against her will, continued friendly official relations with Corea and refrained from holding her responsible for conduct which had been forced upon her. Later however she adopted a new attitude and announced that she would regard Corea as a belligerent. And before the end of the war a battle took place between Russian and Corean troops in the north of Corea.<sup>2</sup>

Whatever may have been the facts concerning the international status of Corea at the beginning of the war, there were no differences of opinion as to the status of China. The province of Manchuria, in which hostilities took place, was undoubtedly, in law, a part of the Chinese Empire and they took place therefore in neutral territory. But the larger part of the province had in fact, been occupied for some years by Russian troops, although the Chinese government had never ceased to protest against the Russian occupation and at the outbreak of the war it affirmed in an energetic manner its rights of sovereignty over the province. Russia had, in fact, admitted the temporary character of the occupation by a convention signed in 1902 by which she promised to evacuate the province. But she had not done so when the war broke out, and whatever may have been the legal situation, her troops occupied in fact the territory. Japan therefore had a right to attack them there and it cannot be justly claimed that she violated the sovereignty or neutrality of China in so doing.<sup>3</sup> But it was clear from the outset that if other parts of the Chinese Empire were made the theater of hostilities the integrity of China

<sup>1</sup> Text in 15 *Rev. Gén.*, pp. 152-153.

<sup>2</sup> Ariga, *op. cit.*, Sec. 18.

<sup>3</sup> Compare Rey, 15 *Rev. Gén.*, p. 164. As to the right of one belligerent to attack the troops of another in the territory of a third power under military occupation or under protection, see Despagnet, *Essai sur les Protectorats*, p. 343.

might be endangered and the peace of the world menaced thereby. Mr. Hay, Secretary of State of the United States, immediately upon the outbreak of war proposed to the three governments concerned that the "neutrality of China and in all practicable ways her administrative entity should be respected by both parties and that the area of hostilities should be localized and limited as much as possible."<sup>1</sup> Both Russia and Japan accepted the American proposal in regard to the localization of the conflict and each agreed also to respect the neutrality of China upon condition that the other belligerent would do so. But Russia also conditioned her engagement upon the strict observance on the part of China of her duties of neutrality and of the law of nations on the part of Japan. The "neutrality" of China here stipulated for, of course, had reference to "temporary" as contra-distinguished from "permanent" neutrality, such as that of Belgium and Switzerland, and it meant that no hostilities were to be carried on in that part of the country comprehended within the term the "administrative entity of China." The neutrality was also conditional in that the respect which each belligerent promised to show for it was dependent upon the condition that the other should equally respect it. As between Japan and Russia, China's position was a delicate one. Even if she remained strictly neutral she was exposed to seeing her neutrality violated by one belligerent on the ground that the other did not respect his engagements and if she resisted the aggression by one, she would likely be treated by it as an enemy; if she did not resist, the other would consider itself released from its obligations to respect her neutrality. As to Chinese sovereignty over Manchuria during the war, it was "ambiguous." The inhabitants owed a

<sup>1</sup> The phrase "administrative entity of China" was meant to include that portion of China which was actually administered by Chinese officials. It did not, of course, include Manchuria and the leased territories. Hershey, *op. cit.*, p. 246, and J. B. Moore in the *Review of Reviews*, Vol. 32, p. 174.

nominal allegiance to China, but they were subject in fact to the authority of the belligerent which might be in possession for the moment.<sup>1</sup> The status of the leased territories (Port Arthur and Liao-Tung) during the war was similar to that of Manchuria and could be made a theater of hostilities, but it would seem that the status of the foreign concessions outside of Manchuria was different and that those of Russia and Japan as well as the others, could not be made a theater of hostilities.<sup>2</sup> Regarding the observance by Japan and Russia of the neutrality of that part of China not embraced within the recognized area in which hostilities were to be carried on, each belligerent charged the other with violating in specific instances its engagements, but with one or two exceptions, the charges were not serious or well-founded. China also made accusations against both belligerents and she in turn was accused of failing in some cases to observe her duties of neutrality toward one or the other belligerent.<sup>3</sup>

The war began by a Russian charge of "treachery," and "bad faith" on the part of Japan for suddenly attacking Russian warships on February 8-9, before issuing a declaration of war and with a breach of international law for making the attack in the neutral Korean port of Chemulpho. Japan answered the first charge by pointing out that already on February 6, she had broken off diplomatic relations with Russia and had notified her that Japan reserved the right to take such independent action as she might deem best to consolidate and defend her menaced position. This notice it was asserted was a sufficient declaration of intention and if the Russian government allowed itself to be taken by surprise it and not Japan

<sup>1</sup> The status of China, including Manchuria, as it resulted from the acceptance of the Hay proposal is fully discussed by Rey in *15 Rev. Gén.*, pp. 165-173; by Hershey, *op. cit.*, Ch. IX; and by Ariga, Ch. 2.

<sup>2</sup> Compare Rey, article cited, p. 178.

<sup>3</sup> These charges and counter-charges are examined by Hershey, *op. cit.*, pp. 253 ff.

was to blame. Neither international usage, the customary rules of international law, nor the Hague Convention<sup>1</sup> required a declaration of war as a preliminary condition to beginning hostilities. The attack of the Russian warships may therefore have been a surprise, but it was not an act of bad faith or treachery, nor a violation of international law. Writers on international law have generally approved the view thus put forward by Japan.<sup>2</sup> As to the charge of a breach of international law for attacking the Russian vessels in the Korean port of Chemulpho, the validity of the charge depended upon the status of Korea, the controversy concerning which I have discussed above.<sup>3</sup>

At the outbreak of the war both belligerents were parties to various international conventions dealing with the conduct of war. On February 27, the Russian government published an

<sup>1</sup> The Hague Convention of 1907 relative to the opening of hostilities, however, requires a "previous unequivocal notice which shall either be in the form of a reasoned declaration of war or an ultimatum with a conditional declaration of war." Many wars in the 19th century were in fact commenced prior to the issue of a formal declaration. See Maurice, *Hostilities without Declaration of War*, and Smith and Sibley, Ch. 3, where the instances are detailed.

<sup>2</sup> Lawrence, p. 28; Hershey, p. 70; Smith and Sibley, Ch. 3; Ariga, Ch. 1; Takahashi, p. 5, and Rey in *Rev. Gén.*, 14, 309, where the whole question is fully examined. In the case of the *Mukden* (Takahashi, p. 602) the Higher Prize Court of Japan upheld the legality of the capture of a Russian merchantman on Feb. 5, the day before the severance of diplomatic relations with Russia, on the ground that a "state of war does not necessarily commence at the moment when opposing armed forces open fire upon each other or when a declaration of war or any such notice is given, but rather when the intention of going to war is carried into effect or when such intention is publicly announced." The capture of the Russian steamship, *Ekaterinoslav*, on Feb. 6 was upheld on the same ground. Text of the decision in Takahashi, pp. 583 ff.

<sup>3</sup> In the case of the *Ekaterinoslav* which was captured three miles off the Korean coast on Feb. 6, and within what was regarded as the territorial waters of Korea, the Higher Prize Court of Japan held that the capture was legal although taking place before the declaration of war and in the waters of foreign country. But the court held that Korea could not be considered "as a neutral in the common sense" because she had consented to the landing of Japanese troops.

imperial order laying down certain rules which it proposed to observe in the conduct of hostilities with Japan, and article 10 of these rules mentioned the Geneva Convention, the Declaration of St. Petersburg and the Hague Conventions and Declarations of 1899, to which the military authorities were bound to conform.<sup>1</sup> Texts of these conventions were distributed to the Russian armies for their information. At the same time the Russian government in accordance with the requirements of the Hague Convention concerning the laws and customs of war issued "instructions" to its armies for their guidance.<sup>2</sup> Such "instructions" are required by the Hague Convention (Art. 1) to be "in conformity with the regulations respecting the laws and customs of war on land annexed to the said convention." Many of the Russian instructions were literal reproductions of the Hague regulations; others conformed in substance to them; but some important rules were entirely omitted from the Russian "instructions," while others still were modified in essential particulars.<sup>3</sup> The promulgation of these "instructions" by the Russian government was highly commendable, though it is to be regretted that they did not conform more strictly to the rules agreed upon by the powers represented at the Hague Conference. The Japanese government does not appear to have made any public announcement as to its intention to observe the international conventions referred to above nor does it appear that it issued to its armies any general "instructions" relative to the conduct of the war. Instructions relating to particular matters, however, were issued by some of the commanders, *e. g.*, by

<sup>1</sup> English text in Hershey, pp. 269-271; French text in *Archives Diplomatiques*, 3rd series, Vol. 89, p. 320.

<sup>2</sup> English text in Hershey, pp. 271 ff.; French text in *Archives Diplomatiques*, Vol. 94, pp. 500 ff.

<sup>3</sup> A comparison of the Russian "instructions" with the corresponding regulations annexed to the Hague convention may be found in Hershey, pp. 272 ff., where the divergences and omissions are pointed out.

Marshal Oyama and General Kuroki,<sup>1</sup> and elaborate regulations relative to the treatment of prisoners of war were issued by the Japanese government on February 12, 1904.<sup>2</sup> A fairly complete naval code entitled "regulations governing capture at sea" was also promulgated on the 15th of March.<sup>3</sup> The regulations issued by the Japanese government, and especially those relating to the treatment of prisoners, were not only in conformity with the requirements of the Hague Conventions, but they represented the most modern and enlightened view of what the laws of war and the dictates of humanity required. An interesting and commendable innovation introduced by the Japanese government was the attachment to each army of specialists in international law with the title of "legal counsellors," to advise the military commanders upon questions of international law arising during the course of military operations and to prepare instructions and regulations relative to the application of the laws and customs of war.<sup>4</sup>

Concerning the treatment of enemy subjects in Russian territory at the outbreak of the war, the Russian regulations provided that they might remain, under protection of Russian law, and continue their peaceful callings without molestation, except in the Imperial Lieutenancy of the Far East (the part of the Russian Empire ruled over by Admiral Alexeieff) and apparently embracing Siberia and Manchuria. From this territory Japanese subjects were summarily expelled with no time to wind up their affairs and to make the necessary preparations for their departure.<sup>5</sup> There have been a few instances

<sup>1</sup> Ariga, p. 4, and Rey, 16 *Rev. Gén.*, p. 486.

<sup>2</sup> French text in 12 *Rev. Gén.*, pp. 605 ff. See also Ariga, Ch. 4.

<sup>3</sup> English text in Takahashi, pp. 778 ff.; French text in 12 *Rev. Gén.*, pp. 613 ff.

<sup>4</sup> Ariga, *op. cit.*, p. 8. For an appreciation of the value of this innovation, see M. Fauchille's preface to Ariga's book, p. vii.

<sup>5</sup> Ariga, p. 37; Lawrence, p. 46, and Takahashi, pp. 33 ff., where the sufferings of some of the refugees thus expelled are detailed. The Japanese residents of European Russia were not numerous and most of

in later times when enemy aliens were thus summarily expelled, but the better practice and opinion have been against measures so harsh and severe, except where they were required by considerations of imperative military necessity. The Russian government justified the expulsion in mass of the Japanese from Siberia and Manchuria as a necessary military precaution. There were large numbers of them in Manchuria especially, and the Russian government feared that they would serve their own country as spies and might in other ways prove a danger to the security of Russia. As a measure of military necessity expulsion *en masse* of enemy aliens is entirely legitimate and Russia was undoubtedly within her legal rights in expelling the Japanese from the territories in question, although the summary manner in which it was done was unnecessarily severe and harsh.<sup>1</sup> The Japanese government, on the other hand, made no such exceptions in its treatment of Russian subjects. The local authorities were instructed that they were not to be interfered with or molested in their persons or property, except in case of assistance to the enemy,<sup>2</sup> and there appear to have been no complaints against the Japanese authorities concerning the actual treatment of Russian subjects. The larger number of Russian residents in Japan left the country with Baron Rosen at the outbreak of the war; those who remained were treated with remarkable moderation and consideration.<sup>3</sup>

them left the country with the Japanese embassy, or shortly thereafter under the protection of the American embassy. Many of the Japanese residents of Vladivostok also left before their expulsion.

<sup>1</sup> The matter is fully examined by Rey, in 14 *Rev. Gén.*, pp. 329-333, where the details concerning the expulsion are given.

<sup>2</sup> See the remarkably liberal instructions of the minister of home affairs to the local governors and prefects, Takahashi, p. 31, and Ariga, p. 37. At the same time the minister of public instruction issued a circular to the school teachers directing them to advise the school children not to manifest any hostility toward Russian children and the minister of the interior gave similar instructions to the various religious sects. See articles by Nagaoka in the *Rev. de Droit Int. et de Lég. Comp.* VI (1904), pp. 480 ff., and Akiyama, *ibid.*, VIII : 567.

<sup>3</sup> Compare Rey, in 14 *Rev. Gén.*, p. 328.



As to the treatment of Japanese merchant vessels in Russian ports at the outbreak of war, the Russian regulations provided that they should be allowed a *délai* not exceeding forty-eight hours within which to leave, a period which was criticized as being unduly short. In consequence, a considerable number of Japanese vessels were prevented from leaving; they were therefore detained with their crews and Japan was deprived of their use for the transportation of troops and supplies. It should be remarked, however, that the Russian decree was dated the 27th of February, seventeen days after the declaration of war and since it did not take effect until the date of publication in the ports to which it applied, the *délai* practically amounted to three weeks during which Japanese vessels could leave.<sup>1</sup> The Japanese government, on the other hand, was more generous, and allowed Russian merchantmen in its ports a period of seven days within which to discharge their cargoes, reload and depart, and any Russian merchant vessel which had left a Japanese port in accordance with this privilege should be exempt from capture during its return voyage to the nearest port of its own country, an exemption concerning which the Russian rules were silent. Furthermore Russian merchant vessels which had sailed prior to February 9, from any foreign port bound for Japan were allowed to enter, discharge their cargoes and leave, and this privilege was not conditioned upon the ignorance of the master of the outbreak of hostilities as it usually is.<sup>2</sup> The Russian regulations did not grant this privilege. The only respect in which the Japanese concession fell short of the most liberal treatment ever accorded was in the duration of the *délai* and the absence of an exemption from capture of enemy merchant vessels that had sailed from a Japanese port prior to the outbreak of hostilities. The Japanese

<sup>1</sup> Compare Ovtchinnicow in *Jour. du Droit Int. Privé*, Vol. 31, 334.

<sup>2</sup> It was more liberal even than that accorded by the United States in 1898 in respect to ships which had left foreign ports before the outbreak of war and were proceeding to an enemy port.

government maintained, however, that considering the character of the commercial traffic between Russia and Japan, seven days was quite sufficient. As to the absence of the exemption referred to, there were special reasons why it was not considered expedient to accord it.<sup>1</sup>

Russian ships which did not leave Japanese ports by February 16, the date of the expiration of the *délai*, appear to have been confiscated as lawful prize and not merely detained.<sup>2</sup>

In the conduct of military operations both belligerents conformed in the main to the rules of the Hague and Geneva Conventions and the war was characterized by few acts of barbarity or cruelty. There were, of course, some charges and counter-charges in respect to firing upon red cross trains, hospitals and flags of truce, of maltreatment of captives, of the use of dum-dum bullets, of the wearing of improper uniforms, and the like, but they were not numerous or serious. In some cases, such as the Russian charge against the Japanese for firing on a red cross train, the charge was satisfactorily explained; in other cases the charges were not substantiated. The greater

<sup>1</sup> These are explained by Takahashi, p. 67. The whole matter of the treatment of the enemy merchant vessels by Russia and Japan is luminously discussed by Rey, in the *Rev. Gén.*, 14, 335 ff. The Japanese prize courts in interpreting the Japanese decree limited the benefits thus accorded strictly to ships of commerce as the British prize courts did during the World War. It did not apply, therefore, to Russian boats engaged in deep-sea fishing, of which many were captured by the Japanese at the beginning of the war, nor to ships having no cargoes to discharge nor to ships apparently owned by a private company but which in fact belonged to the Russian government. The benefit was also refused to Russian ships proceeding from one enemy port to another and to those sailing from one neutral port to another.

See the cases of the *Lessnik*, the *Alexander*, the *Nicolai*, the *Mikhail*, the *Kotik*, the *Rossia*, the *Mukden* and the *Ekaterinoslav* reported in Hurst and Bray's *Russian and Japanese Prize Cases*, Vol. II.

<sup>2</sup> Concerning the capture of these and other Russian merchant vessels before and after February 16, the validity of which appears to have been upheld by the Japanese prize courts in every case, see Rey, 14 *Rev. Gén.* 341-342 and Ovtchinnicow, article cited, where the protests of Russia against the decisions are analyzed.

number of the accusations were directed against the Russians.<sup>1</sup> The most important accusations against the Japanese were the charges of attacking the Russians in the neutral waters of Corea and this before making a formal declaration of war and of violating the neutrality of China, notably by the conduct of a Japanese cruiser in entering the port of Chefoo and towing out the disabled Russian warship *Ryesheinski* which had taken refuge there after a naval battle in which the Russian fleet had been defeated. The former charge has already been discussed. The latter act was justified by the Japanese, not with entire success, on the ground that the Chinese authorities failed to compel the cruiser to leave within twenty-four hours in accordance with the Chinese proclamation of neutrality or to disarm it.<sup>2</sup> The act, however, has been condemned by most writers on international law as a gross violation by Japan of Chinese neutrality for which there was no substantial justification. But it was one of the very few acts of the Japanese which merited reproach, for their record throughout the war was, on the whole, a creditable one.

The troops employed by both belligerents possessed, in general, the qualifications laid down by the Hague Convention in respect to lawful combatants. Neither belligerent resorted to *levées en masse* and with a few exceptions no volunteers were employed by either power.<sup>3</sup> The war on land was therefore fought in the main by regular armies. The most serious charges in respect to non-conformity to the rules of civilized warfare so

<sup>1</sup> These charges and counter-charges are detailed and explained in Takahashi, Ch. IV. See also Hershey, pp. 308 ff., and Smith and Sibley, Ch. IV.

<sup>2</sup> See the Japanese defense in Takahashi, pp. 437 ff.

<sup>3</sup> The instances in which volunteers were employed by the Russians and Japanese are discussed by Rey, art. cited, pp. 496 ff. Some controversy was raised as to whether the forces employed in some of these instances complied with the requirements of the Hague Convention but for want of space the question cannot be discussed here. In general both belligerents interpreted liberally the Hague Conventions relative to the matter.

far as the character of the combatant forces were concerned was that against the Russian authorities for organizing a force from released convicts in the island of Sakhalin. The Hague Convention does not forbid the employment of troops recruited from such a source, but enlightened opinion condemns it. The Japanese complained that these troops were not amenable to military discipline and that they indulged in looting and committed other excesses contrary to the laws of civilized warfare.<sup>1</sup> The action of the Russians in recruiting their forces from among these criminals by offering them their freedom in order to induce them to enlist has been generally criticized by writers on international law.<sup>2</sup> However, the validity of the criticism must depend upon the facts regarding the amenability of such soldiers to military discipline; if they could be held to an observance of the rules of civilized warfare there would seem to have been no objection to their employment. When the Japanese forces occupied Sakhalin they appear to have treated them as lawful combatants.<sup>3</sup>

Japan, on her part, was reproached for having employed as volunteers soldiers recruited from among the bands of Manchurian Chunchuses who appear to have been little more than barbarians and brigands. The Russians were also accused of employing them. Each belligerent formally denied the charges of the other, but there seems to be little doubt that they were so used, and especially by the Japanese. Russia enrolled them among her regular troops and employed them as guides and messengers, but does not appear to have used them for regular combatant purposes, as the Japanese did. If the Chunchuses were brigands of the worst class, as they are said to have been, ignorant of all discipline and guilty, as the Russians charged,

<sup>1</sup> See the charges in Takahashi, p. 179, and Ariga, pp. 266 ff.

<sup>2</sup> Compare Hershey, p. 310; Smith and Sibley, p. 67; Ariga, pp. 266 ff.; Rey, 16 *Rev. Gén.*, pp. 487 ff.; and MacDonell in the *Nineteenth Century*, July, 1904, p. 157.

<sup>3</sup> Takahashi, 236.

of torturing their prisoners, their employment by either belligerent was reprehensible and contrary to the generally recognized rules of civilized warfare.<sup>1</sup> Ninakawa, legal counsellor attached to the army of general Kuroki, admitted that their employment by the Japanese was a shame to the Japanese nation which had recourse to such methods.<sup>2</sup> Ariga, on the other hand, attempted to justify their employment by the Japanese. He distinguished between different categories of Chunchuses, some of whom were admitted to be brigands, whereas others were not, and it was only the latter that the Japanese made use of.<sup>3</sup> The Chinese authorities, however, recognized no such distinction, and in their diplomatic correspondence with the United States referred to them all alike as "bands of Chunchuse bandits," and they were so treated when captured by the Russian forces.<sup>4</sup> Both belligerents, it may be remarked, had recourse to auxiliary cruisers taken over from their merchant marines for the transportation of troops and supplies and even as auxiliary cruisers. No controversies were raised between the two belligerents in regard to the employment of such vessels. The action of two vessels, the *Smolensk* and the *Peterburg*, belonging to the Russian volunteer fleet in the Black Sea, which after passing out of the Black Sea under commercial flags, transformed themselves into war vessels on the high seas and proceeded to visit and search neutral vessels, evoked vigorous protests, especially on the part of the British government. Among other things it denied the belligerent character of the two vessels on the ground that the transformation of merchant vessels into war ships on the high seas was not permissible. This has been the traditional attitude of the British government though opinion on the continent is in general to the contrary.

<sup>1</sup> The matter is fully discussed by Rey, in 16 *Rev. Gén.*, pp. 491 ff.

<sup>2</sup> See his book *The Army of Kuroki and International Law*, cited by Ariga, p. 271.

<sup>3</sup> Ariga, pp. 269 and 271.

<sup>4</sup> Rey, article cited, p. 496.

At the time, English jurists generally denied the validity of the conversion of the *Smolensk* and the *Peterburg* and therefore the legality of the seizures which they made.<sup>1</sup> Upon the demand of the British government the British merchantmen *Malacca* which had been seized by the *Peterburg* was released and the Russian government gave instructions that no further seizures of neutral vessels should be made by ships of the Russian volunteer fleet. In agreeing to this action, however, the Russian government asserted that it did so because the existing status of the volunteer fleet was not sufficiently well defined by international law to render further searches and seizures advisable. There was, therefore, no agreement on the main principle involved. As we shall see later the question as to the conversion of merchant vessels at sea was not settled either by the Second Hague Conference or the International Naval Conference of 1908-09 and therefore remains a matter of controversy.

There was considerable criticism on the part of the Japanese of the sinking by the Russians of Japanese merchant vessels. Takahashi claims that while Japanese cruisers captured many Russian merchantmen, they did not destroy a single one, whereas the Russians sank practically all Japanese merchantmen which they encountered.<sup>2</sup> The Japanese complaint, however, was not well-founded. The prize regulations of many states sanction the destruction of enemy merchant vessels and in most of the maritime wars of the nineteenth century it was exercised in practice and without protest.<sup>3</sup> Its

<sup>1</sup> Letter of Professor Holland to the *London Times*, July 26, 1904; Smith and Sibley, p. 48. See also the discussion by Rey, art. cited pp. 507 ff.; and Hershey, pp. 139 ff.

<sup>2</sup> *Op. cit.*, p. 139. According to Takahashi, 21 of the 24 Japanese merchantmen captured by the Russians were sunk. See the list and the details, *op. cit.*, pp. 275 ff.

<sup>3</sup> I have discussed the opinion and practice regarding the sinking of enemy merchant vessels in my *International Law and the World War*, Vol. I, pp. 362 ff.

legality therefore, can hardly be denied, and owing, as Hall remarks, to the wide range of modern commerce, the inability of modern cruisers to spare prize crews and the indisposition of neutrals to admit prizes to their ports, the practice of destruction is likely to increase rather than diminish.<sup>1</sup> It should be remarked also in defense of the Russian practice, that before destroying the vessels, they removed the crews and passengers and provided for their safety, so that their conduct was far less reprehensible than that of German submarine commanders during the World War. The conduct of the Russians, however, in making prisoners of the crews of such vessels was more reprehensible. However, there was at the time no conventional rule prohibiting it, such as that subsequently adopted by the Hague Conference of 1907. The Japanese practice was more liberal than that of Russia in that only crews who had formerly served in the Russian navy were treated as prisoners; others were released on parole in accordance with the Hague Regulations of 1907.<sup>2</sup>

As to the treatment of prisoners of war it may be affirmed that the regulations issued by both belligerents were in conformity with the spirit of the Hague Conventions and with the requirements of the most humane and enlightened opinions.<sup>3</sup> From first to last, the Japanese military and naval forces captured about 85,000 Russians; of these about 79,000 were treated as prisoners of war, of whom some 72,000 were interned in prison camps in Japan. The captures made by the Russians, on the other hand, were comparatively few, the total number of Japanese prisoners held

<sup>1</sup> *International Law*, p. 457. See also Lawrence, *Principles*, p. 406.

<sup>2</sup> Takahashi, p. 138, and details in Rey, Art. cited, p. 513.

<sup>3</sup> The Russian regulations may be found in Hershey, pp. 276-278; the Japanese regulations are printed in *ibid*, pp. 285-290; French text in Ariga, pp. 93 ff.

in Russia at the end of the war being only 2,083.<sup>1</sup> The selection of sites for the prison camps in Japan appear to have been made in accordance with the best sanitary considerations and it was the testimony of neutral observers that the treatment of Russian prisoners by their Japanese captors was, in general, above reproach. In fact, it may be said that the Japanese set a new standard in this respect, one which has rarely been attained in any other war before or since. In accordance with the requirements of the Hague Convention, the Japanese authorities organized and set up a Prisoners' Information Bureau, whose services commanded favourable attention and gave entire satisfaction to the Russians.<sup>2</sup> There were naturally individual complaints on the part of Russian prisoners of wrongful treatment but they were remarkably few and many Russians themselves testified to the kind treatment which they received in prison camps.<sup>3</sup> Prisoners were allowed a degree of freedom and were accorded privileges such as were unknown in the World War. Concerning the Russian treatment of Japanese prisoners, information is less abundant. The evidence available indicates that the few prisoners held by the Russians were not as a rule badly treated, though there were some accusations of mistreatment in particular instances, especially of prisoners captured by the Russians at Port Arthur. The Russian government does not appear to have imitated the example of the Japanese government in setting up a Prisoners of War Information Bureau, but such a bureau was organized at St. Petersburg by the Red Cross Society, with Professor Martens as its President. There was, however, some complaint on the part of the Japanese authorities that the Russian Bureau did not furnish all the

<sup>1</sup> Ariga, p. 93; Takahashi, p. 94.

<sup>2</sup> The organization and work of the Bureau is described by Takahashi, pp. 114 ff.

<sup>3</sup> Professor Martens himself paid a tribute to the Japanese for the "devoted care bestowed upon the Russian prisoners of war in Japan during the course of the War," quoted by Ariga, p. 121.



details of information concerning prisoners such as the Hague Convention required.<sup>1</sup>

The most important questions of international law arising during the Russo-Japanese War related to the rights and duties of neutrals and to the consideration of some of these questions I now turn. The strictness with which the obligations of neutrality were observed by different states varied, as it has in most wars, with their sympathies for one or the other of the belligerents or according to their traditional policies in respect to neutrality. The policy of the United States was in strict accord with the requirements of the law of neutrality, as it was generally understood. President Roosevelt's proclamation of neutrality, indeed, went further in some respects than the generally recognized rules required. By an executive order subsequently issued, all public officials, civil, military and naval were warned to abstain from action or speech which might legitimately cause irritation to either belligerent. No complaints were made by either belligerent against the United States for having failed in any particular to observe its duties and obligations as a neutral.<sup>2</sup> The policy of Great Britain, notwithstanding the recently concluded alliance with Japan and the popular sympathy for the Japanese, was also in strict accordance with the most advanced views as to neutral duty. There was some criticism, however, against the policy of the German government in permitting the sale to Russia of a number of ocean liners belonging to its auxiliary navy and allowing the exportation to

<sup>1</sup> For detailed Japanese accounts of the treatment of prisoners during the Russo-Japanese War, see Ariga, *op. cit.*, Ch. IV; Akiyama, in the *Rev. de Droit Int. et Lég. Comp.*, Vol. VIII (1906), pp. 578 ff.; and Takahashi, *op. cit.*, Ch. II. For neutral accounts, see Kennan, in the *Outlook* for Sept. 10, and Oct. 29, 1904; Stead, in the *Fortnightly Review*, Feb. 1905; Dillon, in the *Contemporary Review*, for August, 1904; Hershey, *op. cit.*, pp. 318 ff.; and Spaight, *op. cit.*, pp. 276 ff. Spaight pays a high tribute to the Japanese for the efficient and considerate manner in which they treated their prisoners.

<sup>2</sup> The policy of the United States is discussed by Hershey, *op. cit.*, Ch. II.

Russia for the use of the Russian Navy of a number of torpedo boats. According to the Geneva award in the *Alabama* case, a neutral is liable for damages for allowing vessels to be fitted out, armed or equipped in and to depart from its ports, with the intention of being used for belligerent purposes. This principle although not approved by all English writers on international law is viewed with favor generally by continental jurists and was incorporated in the British foreign enlistment act of 1870. As the rule, however, seems to make the validity of such acts depend upon the intent of the owner or vendor it is unsatisfactory and inadequate.<sup>1</sup> In view, however, of the fact that the German vessels sold to Russia were subsidized by the German government and were auxiliary cruisers in its navy, they were in a different class from vessels whose owners have no such relation to their government. It would seem, therefore, that in permitting their sale to Russia, the German government did not comply at least with the spirit of the law of neutrality. As to the sale of the torpedo boats to Russia by private shipbuilders and as ordinary commercial transactions, it can hardly be said that it was contrary to the established practice, however much may be said against it on principle. The traditional policy of most countries has been to regard such transactions as legitimate acts of trade which are governed by the law of contraband.

The conduct of the French authorities in permitting ships of the Russian fleet during its voyage from the Baltic Sea to the far east to take on a full supply of coal in French ports and to remain there for more than twenty-four hours was the subject of complaint on the part of the Japanese government. There was at the time no established rule of international law and no treaty stipulations which forbade such acts, although a number of states had proclaimed the principle in their neutrality acts or proclamations. During the American Civil War, Great

<sup>1</sup> Compare Hershey, p. 102; Lawrence, *Principles*, p. 102; and Hall, *Int. Law* (3rd ed.), p. 619.

Britain had imposed a limitation in respect to the amount of coal which belligerent war ships might take in British ports and the United States adopted the same policy in 1898. At the outbreak of the Russo-Japanese war both Great Britain and the United States, as well as Holland, China and the Scandinavian countries in their neutrality proclamations restricted the stay of belligerent vessels in their ports to twenty-four hours, except in case of necessity and limited their coal supply to an amount sufficient to take them to their nearest home port (or in some cases to the nearest neutral port of destination).<sup>1</sup> The French Government did not go to such lengths but allowed belligerent vessels to take such supplies as were "necessary to the sustenance of the crew and safety of the voyage" and no limitations were imposed on the duration of the stay of belligerent warships in French ports. That is to say, belligerents were left practically free to take what they wanted and to repeat the process in every French port which they visited. This enabled the Russian fleet to make its long voyage from Russia to the far east, without which it would have been impossible. In answer to the Japanese complaint, the French Government replied that the privilege thus availed of by the Russian fleet was equally open to Japanese warships, so that there was no intentional discrimination.<sup>2</sup> But the Japanese, not having occasion to make use of French ports for such purposes, pointed out that the privilege accorded was, in fact, one-sided and operated exclusively for the benefit of Russia. The conduct of the French was therefore in effect, unneutral. As the matter was not regulated by any of the international conventions and as

<sup>1</sup> See neutrality proclamations, House Doc., 58th Cong. 3rd Ses., pp. 14 ff., and 11 *Rev. Gén.*, Docs. 1-18. The restrictions imposed by the Egyptian government and the governor of Malta were even more stringent. See the details in Hershey, pp. 199-200; Lawrence, pp. 134-135; and Smith and Sibley, Ch. IX. Norway and Sweden closed entirely certain of their ports to belligerent vessels of both parties.

<sup>2</sup> See the French reply in Hershey, pp. 195-197.

there was no universally accepted practice or rule of customary law which forbade it, it would be going too far to say that the conduct of France was contrary to the law of neutrality, but it would seem to have been in contradiction to the spirit of genuine and impartial neutrality.<sup>1</sup> Impartiality of treatment in such cases is not sufficient, for one belligerent alone may gain all the advantage so that in fact the treatment may be entirely one-sided. The rule of total abstention or prohibition in such cases, such as that proclaimed by the governor of Malta, is the only rule that will insure absolute equality of treatment. With the enormous increase in the importance of coal in naval warfare the necessity of placing some restrictions upon belligerents in the use of neutral ports for replenishing their supplies has become manifest if neutrals are to abstain from rendering assistance to one side which cannot in fact be enjoyed by the other. A belligerent which has no colonial ports or coaling stations may, if no restrictions are imposed, carry on effective naval operations in distant seas by provisioning in neutral ports and by returning to them again and again as often as it wishes and without ever using its own ports, whereas the other belligerent may never have occasion to so use them.<sup>2</sup> It may be, and has been argued, that the denial of the privilege of replenishment to a belligerent so circumstanced would give a belligerent which, like Great Britain, possesses ports and coaling stations in all parts of the world a great advantage over an enemy not so favored.<sup>3</sup> This must be admitted, but on the other hand, it cannot be justly contended that it is the right or duty of neutrals to endeavor to equalize the advantages by allowing their ports to be used as sources of supply and therefore in effect bases of operations

<sup>1</sup> The Japanese writer Nagaoka (*Rev. Gén.* 12 : 629) argues that the French policy was contrary to the "law of nations" but Lawrence (p. 128) and Smith and Sibley (p. 128) hold, very properly, it would seem, that it was not a violation of the law, although it may have been contrary to the spirit of true neutrality.

<sup>2</sup> Compare Hall, *Int. Law* (3rd ed.), p. 607.

<sup>3</sup> See Dupuis, *Le Droit de la Guerre Maritime* (1899), p. 432.

for the less favourably circumstanced belligerent. For a neutral thus to aid the one belligerent is to injure the other.<sup>1</sup> China was the only other neutral power which was charged with failure to observe strictly her neutral duties. Most of the charges were made by Japan and for the most part they related to the alleged failure of the Chinese authorities to enforce the terms of the Chinese proclamation of neutrality regarding the stay of belligerent warships in Chinese ports. After the defeat of the Russian fleet by the Japanese in August, 1904, a number of Russian war ships which escaped destruction took refuge in Chinese ports. The Japanese authorities complained that in some cases they were not required to leave within twenty-four hours or to disarm as the Chinese proclamation of neutrality required, and in the case of the *Ryeshetelni*, the Japanese themselves violated the neutrality of China by sending a cruiser into the Chinese port of Chefoo and towing the *Ryeshetelni* out of the harbor, although the vessel was partially disabled and in part disarmed. The Japanese authorities attempted to justify their conduct on the ground that China had shown herself to be either unwilling or incapable of enforcing her neutral obligations. The Japanese act, however, has been generally condemned by writers on international law as unjustified.<sup>2</sup> After this incident, the other Russian warships in Chinese ports were dismantled and laid up and their crews interned or released on parole, and this policy was adopted by the United States in the case of the *Lena*, a Russian warship which took refuge in the port of San Francisco and in the

<sup>1</sup> Compare Nagaoka in the 12 *Rev. Gén.*, 630, and Pillet, *Les Lois Actuelles de la Guerre*, 2nd ed., p. 306.

<sup>2</sup> Hershey, p. 263. But the act is defended by Takahashi, p. 441, who maintains that even if the *Ryeshetelni* had been disarmed, which he says was not the case, it could not have been a compliance by China with her neutrality regulations, which required the vessel to leave the port.

case of three Russian vessels at Manila.<sup>1</sup> The practice of interning belligerent war ships (with their crews) taking refuge in neutral ports which are unable to complete the repairs necessary to render them seaworthy and to depart within the time prescribed, appears to have been a new one and was subsequently followed by neutrals during the World War.<sup>2</sup> The internment of refugee land forces, however, was an old practice and was sanctioned by both the Hague conferences.<sup>3</sup> The analogy between the two situations is not entirely exact, but they are alike in general principle. The Hague Conventions of 1899 were silent in regard to the internment of refugee war ships, but the practice during the Russo-Japanese war commended itself to the Second Conference and it was "regularized" and sanctioned by the Convention respecting the rights and duties of neutral powers in naval war.<sup>4</sup>

Turning now to a consideration of the observance by the belligerents of their duties toward neutrals, we find that, with the exception of the *Ryeshetelni* incident, already referred to, no serious complaints were made against the conduct of the Japanese. The policy of the Russian government, however, in placing coal, foodstuffs and raw cotton on the list of absolute contraband and in sinking neutral merchantmen engaged in transporting contraband, provoked vigorous protests from neutral governments and was the subject of general denunciation by writers on international law. The Russian contraband list, in fact, ignored the distinction which had always been made

<sup>1</sup> Takahashi (441-418) gives the names of 30 Russian war vessels that were interned in neutral ports during the war.

<sup>2</sup> See my *Int. Law and the World War*, Vol. II, pp. 422 ff.

<sup>3</sup> Convention of 1907 respecting the rights and duties of neutral powers and persons in war on land, Arts. 11-12.

<sup>4</sup> Hall, however, condemns the dismantling of belligerent vessels, which have been defeated in battle and which have sought refuge in neutral ports, mainly because it involves assistance by the neutral to the other belligerent. *Int. Law*, p. 626. But compare the contrary views of Smith and Sibley, p. 138.

between absolute and conditional contraband and which regarded goods in the latter category as exempt from capture except in particular circumstances, as where they were clearly destined for the use of the government or armed forces of a belligerent. Evidence of such use was destination to a besieged place, or a naval port and even in that case it had been the general practice not to confiscate the goods but to pay the owners for them. Russia herself in 1884 had declared that she could not recognize coal as contraband and there had been no instance in which cotton had been so treated. The position now taken by Russia not only represented a distinct departure from the practice in former wars, but it was inconsistent with her own previous attitude. The Secretary of State of the United States promptly entered a protest against the Russian policy and explained the American view and practice in regard to conditional contraband. Such an extension of the principle as that made by Russia, it was said, did not "appear to be in accord with the reasonable and lawful rights of neutral commerce."<sup>1</sup> The British government likewise protested, particularly against the inclusion of rice and other foodstuffs in the category of absolute contraband as a "very serious innovation."<sup>2</sup> Mr. Balfour, speaking in the House of Commons, declared that foodstuffs coal, cotton and other articles which had always been regarded as conditional contraband were not liable to capture except when intended for the armed forces of the enemy.<sup>3</sup> For a time the Russian government persisted in its policy notwithstanding the protests of Great Britain and the United States, and captured a number of American, British and German merchantmen on the charge, among others, that they were carrying

<sup>1</sup> Communication of Secretary Hay to the ambassadors of the U. S. in Europe, June 10, 1904. Text in Hershey, p. 168, and Takahashi, p. 497.

<sup>2</sup> Text of Lord Lansdowne's note of July 29, to Mr. Choate, Takahashi, p. 500.

<sup>3</sup> Smith and Sibley, p. 227.

contraband to Japan. In the case of the *Arabia*, a German vessel carrying a cargo of American flour, machinery and railway material consigned to Hong Kong and Japan, the Russian prize court condemned the portion of the cargo consigned to Japanese ports, but released the vessel and the portions of the cargo consigned to Chinese ports. But on account of the American protest the higher admiralty court reversed the decision of the lower court. In the analogous case of the *Calchas*, a British steamer laden largely with American flour, cotton, leather, machinery, etc., consigned to commercial firms in Japanese ports, the higher prize court upheld the legality of the seizure and confiscated certain portions of this cargo on the ground that there was a presumption that it was intended for the use of the Japanese army or naval forces, that the burden of proof was on the consignors and consignees to show the contrary and that they had failed to do so. Both the American and British governments protested not only against the principle of the Russian policy, which regarded conditional contraband as liable to capture when consigned to private firms in commercial ports of Japan, but also against the Russian rule which shifted the burden of proof in respect to intended belligerent use from the captor to the consignee or consignor. In consequence of these protests, the Russian Government receded from its position, admitted the principle of conditional contraband, at least in respect to rice and other foodstuffs, and agreed to shift the burden of proof back to the captor.<sup>1</sup> As to the treatment of coal and raw cotton, however, the Russian government apparently could not be induced to recede from its original position. In the case of the *Allanton*, a British merchantman captured by the Russians while proceeding with a cargo of coal from a Japanese port to the neutral port of Singapore, the doctrine of

<sup>1</sup> The whole matter is fully discussed by Hershey, Ch. VI; Smith and Sibley, Ch. XIII; Lawrence, Chs. VII-VIII; and Takahashi, Ch. IV. See also Holland, *Letters on War and Neutrality*, pp. 132 ff.



continuous voyage appears to have been applied by the Russian prize court—the only case during the war, it may be remarked, in which the rule was applied and in this case it was a rather singular extension of the rule. As the vessel was proceeding on a return voyage from Japan and in the opposite direction, it was hardly liable to capture, even admitting the Russian contention that coal was absolute contraband. This ship was condemned, however, by the lower prize court apparently on the ground that it had previously carried contraband to a Japanese port on its outward voyage. But the vessel was released by order of the higher admiralty court at St. Petersburg.

As to the merits of the general Russian policy of ignoring the distinction between absolute and conditional contraband, by applying the same rules to the transportation of both categories of goods and of throwing upon consignees or consignors the burden of proving that goods of the latter class were destined only for innocent commercial uses, it is of course true that it was contrary to the general practice of the past as well as the opinion of the authorities and the jurisprudence of the prize tribunals. It was the subject of vigorous, and, in part, successful protest on the part of neutral governments, affected and it was condemned at the time by jurists and writers on international law almost without exception. Nevertheless, it must be admitted that under modern conditions the distinction between the two classes of contraband has largely ceased to have any practical importance and the rules existing at the time regarding the carriage of conditional contraband to enemy ports were unsatisfactory and illogical. Under these circumstances it is not at all surprising that Great Britain, which had protested so vigorously in 1904 against the Russian policy, should have during the World War adopted and applied the rule which she had formerly condemned, because the experience of that war had shown that the old rules were ineffective and based upon illogical distinctions.

Another Russian practice which provoked vigorous protest was the policy of sinking neutral merchant vessels carrying contraband. The right of a captor to sink *enemy* merchant vessels was fully recognized and had long been exercised in fact,<sup>1</sup> but there had been no instances in the wars of the nineteenth century in which neutral merchant vessels had been deliberately sunk by their captors.<sup>2</sup> The Russian practice was therefore a departure from a long established usage. Eight neutral merchantmen, English, German and Danish, were sunk, most of them on the ground that their cargoes consisted wholly, or in part, of contraband goods, and for want of an adequate coal supply and the danger of recapture, it was considered impossible to take them into a home port for adjudication by a prize court.<sup>3</sup> The sinking of the *Knight Commander*, a British steamer, was indignantly denounced in England as a gross outrage upon neutrals and a serious violation of international law and a vigorous protest was made by the British government against the act. The American government likewise informed the Russian government that it would view with the "gravest concern the application of similar treatment to American vessels,"<sup>4</sup> though in a subsequent telegram Mr. Hay stated that "he was not prepared to say that in case of imperative necessity a prize may not be lawfully destroyed by a belligerent captor."<sup>5</sup> The Russian government justified the sinking of the *Knight Commander* on the ground that it was carrying contraband of war to the enemy and that the captor was unable to take it into a home port for adjudication, without danger to the

<sup>1</sup> The matter is discussed at length in my *International Law and the World War*, Vol. I, pp. 363 ff.

<sup>2</sup> As to past practice, see Baty, *Britain and Sea Law*, pp. 2 ff., and my work cited above, Vol. II, Ch. 31.

<sup>3</sup> The circumstances under which each vessel was destroyed are detailed in Hurst and Bray's *Russian and Japanese Prize Cases*, Vol. I, and in Takahashi, pp. 310-330. See also Baty, *op. cit.*, pp. 7 ff.

<sup>4</sup> Hershey, pp. 144-145; Holland, *Letters on War and Neutrality*, pp. 161; and Baty, *op. cit.*, p. 10.

<sup>5</sup> Foreign Relations of the United States, 1904, p. 337.

Russian squadron, because of the lack of a supply of coal. International law, it argued, permitted the destruction of neutral merchantmen under such circumstances. Nevertheless, the Russian government consented to modify its policy and orders were given to naval commanders not to sink in the future neutral merchantmen carrying contraband except in cases of "direst necessity." The decision of the Russian prize court at Vladivostok which had condemned the *Knight Commander* was subsequently reversed by the higher prize court at St. Petersburg and the Russian government paid the British government an indemnity for the destruction of the vessel.

Regarding the merits of the Russian contention, it must be admitted that the prize regulations of various states, including those of Japan, authorized the destruction of neutral prizes in exceptional cases, such as the unseaworthiness of the ship, when the prize was exposed to the danger of recapture, when the captor was unable to spare a prize crew, and the like. The British prize manual, however, directed naval commanders to release neutral prizes in such cases and British authority and practice had always been in favor of the view that when a neutral prize could not be taken in for adjudication it should be allowed to go, since no military necessity could justify its destruction. But this view of the law was not unanimously accepted even among English jurists. Professor Holland, for example, declared at the time that the destruction of neutral prizes was not absolutely prohibited by international law under any and all circumstances, and he pointed out that it was allowed in exceptional cases by the most recent prize regulations of France, Japan, Russia and the United States, although he readily admitted that the practice should be forbidden by international agreement.<sup>1</sup> The matter was discussed at the

<sup>1</sup> See his letter to the London *Times*, in his *Letters on War and Neutrality*, p. 168. I have reviewed the practice and authority in regard to the sinking of neutral merchant vessels in my work cited above, Vol. II, pp. 258 ff.

Second Hague Conference without definite result, but the international naval conference at London (1908-09) agreed that the right of destruction in exceptional cases must be admitted and a rule to this effect was incorporated in the Declaration of London (Art. 49). It would seem, therefore, that while the Russian policy of sinking neutral prizes was unprecedented in fact, it was not forbidden by any international convention and since the prize regulations of a number of important states recognized the right of destruction, under exceptional circumstances, the denunciation of the Russian practice as an outrage upon neutral rights and a serious violation of international law was hardly justified. Whatever may be said in criticism of the Russian policy of sinking neutral prizes this much at least can be said to the credit of their naval commanders, namely, that in every case the crews, the passengers and the mails were removed in advance and no lives were lost in consequence of the sinkings. Their conduct, therefore, was much less reprehensible than that of German submarine commanders during the World War, who uniformly destroyed their prizes without making provision for the safety of innocent persons on board.

In conclusion, it may be said that throughout the Russo-Japanese war the Hague Regulations of 1899 as well as the customary rules of warfare were fairly well observed by both belligerents in their relations with each other and with neutral powers. With the possible exception of the Spanish American war of 1898, there has been no recent war in which there were fewer well-founded charges of violations of the law. The cruelties, barbarities and extreme measures which have characterized certain other recent wars were largely lacking in this one. There were, of course, specific instances in which the law was undoubtedly violated by both belligerents, but they were relatively few and usually of minor importance. In most cases they were not deliberate and premeditated; in some cases they were justified by the accused belligerent because of the non-observance of the law by the enemy or by a neutral; in other

cases there was a divergence of opinion as to what the law required, so that the act complained of was not contrary to the law, as it was interpreted by the accused belligerent.

With remarkably few exceptions the conduct of the Japanese government as well as its commanders was above reproach. In designating experts on international law to accompany its armies and advise commanders as to their rights and duties, the Japanese Government showed its desire that the war should be conducted as nearly as possible in accordance with the accepted rules of international law. Unfortunately this commendable innovation was not followed in subsequent wars. In this and in other respects the Japanese set a new standard and one which has been justly commended by writers on international law.<sup>1</sup> On the whole, they showed a regard for the law and a respect for the rights of prisoners of war, of non-combatants, of enemy aliens and for the sick and wounded soldiers such as we have seen in few other wars.

<sup>1</sup> Compare Hershey, p. 323; Smith and Sibley, p. 8; and Fauchille's preface to Ariga's treatise cited above.

## LECTURE VI

### Interpretation and Application of International Law in Recent Wars (continued)

#### III

#### THE TURCO-ITALIAN WAR.<sup>1</sup>

In September, 1911, four years after the adjournment of the second Hague Peace Conference, Italy suddenly declared war upon Turkey. Of the causes of the war we are not here concerned. On the one side, it was condemned as an unjust war begun by Italy in violation of her treaty engagements and contrary to the most elementary principles of international law, and this without any serious attempt to settle the controversy by negotiation.<sup>2</sup> On the other hand, the war was defended by

<sup>1</sup> The literature dealing with the interpretation and application of international law during the Turco-Italian war is not very extensive. Among the better studies may be mentioned Sir Thomas Barclay's *The Turco-Italian War and Its Problems* (1911); Coquet, *La Guerre Italo-Turque au Point de Vue du Droit International*, in the *Rev. Gén. de Droit Int. Public*, Vol. 19, pp. 370 ff.; Vol. 20, pp. 243 ff., 510 ff. and 605 ff., and Vol. 21, pp. 105 ff. and 245 ff.; Rapisardi-Mirabelli, *La Guerre Italo-Turque et le Droit des Gens*, in the *Revue de Droit International et de Législation Comparée*, Vol. 44, pp. 159 ff. and 410 ff. and Vol. 45, pp. 85 ff. and 523 ff.; General den Beer Poortugael, *Le Droit des Gens en Marche vers la Paix et la Guerre de Tripoli* (1912); an article by X entitled *La Nostra Guerra con la Turchia* in the *Rivista di Diritto Internazionale*, 1912, pp. 54 ff.; Nord, *Türkische Preisengerichtsbarkeit im tripolitanischen Krieg*, in *Zeitschrift für internationales Recht*, Vol. 22 (1912), pp. 290 ff.; Pinon, *L'Europe et la Guerre Italo-Turque* in the *Revue des Deux Mondes*, June 1, 1912, pp. 599 ff. Besides the article referred to in the *Rivista di Diritto Internazionale* for 1912 there are articles by Anzilotti, Fusinato, and others dealing with particular questions of international law raised during the war. Other sources of information are cited below. A full and valuable bibliography is given by Rapisardi-Mirabelli in 45 *Rev. de Droit Int. et de Lég. Comp.*, pp. 667-671.

<sup>2</sup> This is the thesis of Sir Thomas Barclay in his book referred to in the preceding note. Italy, he maintains, not only violated the

Italian writers and statesmen as the "epilogue of a long series of vexations and injuries—inflicted on Italy and on Italians by the authorities of the Ottoman Empire." Italian nationals, particularly in Tripoli, it was alleged, had been maltreated, denied justice and otherwise oppressed and the Italian government had been unable to obtain promises of redress.<sup>1</sup> To these charges the Ottoman government replied that the Italian grievances were either vague or ill-founded and that the real motive of Italy in declaring war was to appropriate the coveted Turkish provinces of Tripoli and Cyrenaica.<sup>2</sup>

As in the case of the other two wars discussed in the preceding lecture, the pacific agencies recommended by the Hague conferences for settling international differences proved entirely ineffective to prevent the conflict. It happened that neither Italy nor Turkey had ratified the Convention of 1907 for the pacific settlement of disputes, but both were parties to the corresponding Convention of 1899 and until the former convention had been ratified the latter was binding upon them. Article 8 of the treaty of Paris of 1856, which provided that in case a dispute should arise between the sublime Porte and one or more of the other contracting parties which should menace their relations, the sublime Porte and each of these powers, before having recourse to arms, would endeavor to prevent this extremity by their mediatory action, was also binding upon both Italy and Turkey. The duty, here created, to have recourse to mediation was therefore not merely facultative, but was

treaties of Paris of 1856 and of Berlin of 1878, but also the Declaration of London of 1871 regarding the binding force of treaties and the Hague Convention of 1899 for the pacific settlement of international differences.

<sup>1</sup> See the Italian ultimatum to the Ottoman government and the semi-official statement of the Italian case in Barclay, pp. 108 and 114; also Rapisardi-Mirabelli on the causes of the conflict in 44 *Rev. de Dr. Int. et de Lég. Comp.*, pp. 159 ff.

<sup>2</sup> See the Ottoman reply to the Italian ultimatum and the semi-official statement of the Turkish case in Barclay, pp. 111 ff. and 119 ff. See also a review of the causes of the war by Coquet, 19 *Rev. Gén.*, pp. 370 ff.

obligatory.<sup>1</sup> Italy on her part, however, took no step toward compliance with this obligation or with the recommendation of the Hague Conference in respect to recourse to mediation, and the precipitancy with which she declared war against Turkey left the Ottoman government no opportunity to appeal to the good offices or mediation of friendly powers. After the war broke out, the Ottoman government addressed an appeal to the powers in which it urged them to employ their good offices to bring about a termination of hostilities, but the appeal was heard with silence.<sup>2</sup>

There remained also the machinery of article 3 of the Convention of 1899, relating to the offer by third parties of their good offices. But this alternative also proved fruitless. Owing to the suddenness with which the war was declared, neutral powers had no opportunity to tender their good offices to prevent the outbreak of hostilities.<sup>3</sup> After the outbreak of the war Germany is said to have offered her mediation and the British government apparently sounded both belligerents on the subject, but the answer was not such as to encourage it to believe that an offer would be favorably received and the

<sup>1</sup> Cf. Despagnet, *Cours de Droit Int.*, Sec. 475. But Rapisardi-Mirabelli (art. cited, Vol. 44, p. 420) argues that the recourse to mediation contemplated by Art. 8 of the treaty of Paris was not obligatory. Even if the article had not fallen into desuetude, the reserve "so far as circumstances permit" deprived it of all obligatory force. He also pointed out that at the first Hague Conference the first Turkish delegate had, before signing the convention, declared in the name of his government that it was understood that recourse to good offices, mediation, arbitration, etc., was in no sense obligatory and that the Ottoman government reserved the right to judge for itself whether it would have recourse to these means of settlement. From this, Rapisardi-Mirabelli concluded that the European powers did not consider themselves bound by more rigorous obligations in regard to Turkey and that each power remained the sole and exclusive judge as to whether "circumstances" permitted recourse to the abovementioned means of pacific settlement.

<sup>2</sup> Details in Coquet, 19 *Rev. Gén.*, 395 ff.

<sup>3</sup> On this point Sir Edward Grey stated in the House of Commons on Nov. 3, 1911, that "the first communication of any intention to seize Tripoli which His Majesty's Government received was the notification of



matter was not pressed.<sup>1</sup> The council of the Inter-parliamentary Union, at a meeting in Paris on October 4, unanimously adopted a resolution expressing regret that the war had been declared with such suddenness, that no opportunity had been allowed for the employment of good offices or mediation to prevent hostilities and that the *démarches* of certain powers subsequent to the outbreak of the war had been fruitless. It further expressed the hope that action would yet be taken by the powers signatory to the Hague Convention to bring about a restoration of peace.<sup>2</sup> In the French Senate, Baron d'Estournelles de Constant appealed to the French government to propose mediation and a similar effort was made in the British House of Commons. But these and similar mediatory proposals all came to naught, doubtless because there was no reason to believe that an offer would have been favorably considered, at least not by Italy.<sup>3</sup> Finally, there remained the alternative of arbitration recommended by the Hague Conference as the "most effective and at the same time, the most equitable means of settling disputes which diplomacy has failed to settle." This, however, was merely a platonic declaration; it created no obligation to arbitrate any dispute, least of all those involving the "national honor" or "vital interests of the parties." In the Italian ultimatum to Turkey, care was taken to declare that so far as Italy was concerned, the issue involved a "vital interest of the very first order." This precaution was doubtless taken by Italy to forestall any suggestion that she might be under a moral obligation to agree to the arbitration of her dispute with

the declaration of war on September 30." Barclay, p. 37. As to Germany's mediatory efforts see Coquet, 19 *Rev. Gén.*, p. 399.

<sup>1</sup> Barclay, pp. 20 and 29.

<sup>2</sup> Text in 19 *Rev. Gén.*, 397.

<sup>3</sup> Later on during the war mediatory endeavors were made by the powers to bring about the cessation of hostilities. The only result was to induce both belligerents to issue statements of the terms upon which they would be willing to conclude peace. Italy insisted that the

Turkey.<sup>1</sup> It happened, however, that Italy was one of the few states which by treaty had agreed to arbitrate all disputes, whatever their nature and without the customary exception in regard to those involving the so-called "vital interests" and "national honor." Such a treaty she had concluded with the Argentine Republic in 1907. She had, however, no such treaty with Turkey, but there was no reason why, if she could safely arbitrate such disputes with Argentina, she could not with equal safety settle similar disputes with Turkey in the same manner. But she made no such proposal in 1911, and had it been suggested by the Turkish government or that of some friendly power there is no likelihood that it would have been favorably considered. Thus all the pacific means recommended by the Hague Conferences for preventing the war proved fruitless as they have generally proved before and since. No alternative remained therefore, except recourse to arms and by this means the issue was settled.

A grave charge against Italy, as stated above, was that she not only violated her treaty engagements and the principles of international law in attacking Turkey, but that she began the war suddenly and with little or no attempt to settle the controversy by negotiation. It was, in fact, only four days before the declaration of war that the world knew anything of a controversy between the two governments. The Hague Convention of 1907 relative to the opening of hostilities had not been ratified by either Italy or Turkey and it was not, therefore, binding on them unless, as is contended by some writers to be

recognition by Turkey of the full and complete sovereignty of Italy over Tripoli and Cyrenaica must precede any discussion of peace terms. The Turkish government insisted upon the "effective and integral maintenance of the sovereign rights of the Sultan," and the formal renunciation by Italy of the annexation of Tripoli and Cyrenaica and the withdrawal of Italian troops, as a condition precedent to negotiations. Neither side was willing to compromise and the deadlock could not be broken. See the details in 6 *Amer. Jour.* 719-722.

<sup>1</sup> Compare Barclay, p. 26, and Coquet, 19 *Rev. Gén.*, p. 399.

the case, it was merely declaratory of established customary rules of international law. But whatever may be the facts as to this, Italy, we are told, was unwilling to incur the severe judgment of the civilized world by refusing to respect the Hague Conventions of 1907, even if she were not a signatory party,<sup>1</sup> and she therefore complied technically, at least, with the procedure required in respect to the beginning of hostilities. In its notification to foreign governments of a state of war, the Italian government asserted that its declaration of war had been made "conformably to the dispositions of the III Convention of the Hague of October 19, 1907 (Art. 2)." The facts as to the Italian procedure are as follows: on the night of the 26th of September the Italian minister of foreign affairs addressed to the chargé d'affaires at Constantinople a dispatch, a copy of which was delivered to the Turkish chargé at Rome, notifying the Porte that the Italian government had decided "to proceed to the military occupation of Tripoli and Cyrenaica." It was added that the Italian government expected that the Ottoman government would, in consequence, "give orders so that it may meet with no opposition from the present Ottoman representatives and that the measures which will be the necessary consequence may be effected without difficulty." A "peremptory reply" was requested within twenty-four hours, in default of which, the Italian government would be obliged "to proceed to the immediate execution of the measures destined to ensure the occupation." Adverting to a recent proposal of the Ottoman government to enter into negotiations with a view to the removal of the sources of the Italian complaints and to its offer to grant any economic concessions compatible with the treaties in force and with the dignity and interests of the Turks, the dispatch declared that the Italian government "did not now feel itself in a position to enter upon such negotiations, the

uselessness of which is demonstrated by past experience, and which far from constituting a guarantee, could but afford a permanent cause of friction.”<sup>1</sup> Thus the Italian government not only refused to negotiate for a peaceful settlement of the controversy, but, by allowing only twenty-four hours for a reply to its ultimatum, it permitted, as stated above, no opportunity for friendly powers to offer their good offices or mediation with a view to averting, if possible, the war which was certain to follow the rejection of the ultimatum. The ultimatum itself was somewhat unusual in character. Ordinarily the purpose of an ultimatum is to require the satisfaction of certain demands and it is coupled with a warning that in case they are not satisfied the party making the demand will have recourse to war.<sup>2</sup> In the present case, Turkey was required to consent to the military occupation of a portion of her territory, in default of which it would be occupied by the party making the demand. For Turkey, Tripoli and Cyrenaica would be occupied whatever answer was returned; her only choice, therefore, was to allow the Italians to occupy the provinces without resisting or to make an effort to defend them. Under these circumstances the Ottoman government did not need to prolong its deliberations. The ultimatum was delivered to the Grand Vizier on September 28th, at half past two o'clock in the afternoon. On the following day at 9-15 o'clock in the morning the Turkish reply was delivered to the Italian minister of foreign affairs at Rome. The reply was admitted by Italian writers to have been very conciliatory in tone.<sup>3</sup> It denied that the Ottoman government had shown itself hostile to Italian enterprises in the two provinces; it asserted that the Porte had always examined in the most friendly spirit all the claims of the Italian government; that it had offered economic concessions to the Italians;

<sup>1</sup> English text of the ultimatum in Barclay, pp. 109-111; Italian text in the *Rivista di Diritto Internazionale* (1912), pp. 67 ff.

<sup>2</sup> Compare Pillet, *Les Lois Actuelles de la Guerre*, 2nd ed., p. 67.

<sup>3</sup> Rapisardi-Mirabelli, art. cited, Vol. 44, p. 415.

and the like.<sup>1</sup> But the reply was unsatisfactory to the Italian government and in the afternoon of the same day a declaration of war was handed to the Porte by the Italian ambassador. The declaration recited that the "period allowed by the Royal government to the Porte with a view to the realization of certain necessary measures had expired without a satisfactory reply having reached the Italian government," and it added, "the lack of this reply only confirms the bad will (*mauvaise volonté*) or want of power of which the Turkish government and authorities have given such frequent proof, especially with regard to the rights and interests of Italians in Tripoli and Cyrenaica." The Royal government was therefore obliged to safeguard its rights and interests as well as its honor and dignity. The relations of peace and friendship being therefore interrupted between the two countries, Italy considered herself from that moment in a state of war with Turkey.<sup>2</sup> Later in the afternoon it was officially announced that the Ottoman government, having failed to meet the demands contained in the Italian ultimatum, Italy and Turkey were "in a state of war from half-past two o'clock the same day." Hostilities are said to have begun half an hour later. Technically the Italian government had complied with the procedure required by the Hague Convention relative to the opening of hostilities; in fact, by issuing a formal declaration following the rejection of the ultimatum it did more than was required, since the Convention allows the alternative of either a declaration or an ultimatum with a conditional declaration, but does not require both.<sup>3</sup> In refusing the Turkish offer of negotiations, however, and in presenting an ultimatum

<sup>1</sup> Text of the Ottoman reply, in Barclay, p. 111.

<sup>2</sup> Text of the declaration of war and the official notification of the existence of war, in Barclay, p. 113.

<sup>3</sup> The Turkish government appears to have complained, however, that Italy actually began hostilities before the expiration of the period fixed by the ultimatum but the charge does not seem to have been well founded. Compare Coquet, 19 *Rev. Gén.*, p. 406, and Rapisardi-Mirabelli, 44 *Rev. de Droit Int. Pub.*, 415, and 45 *ibid.*, p. 666. But it

with a time limit of only twenty-four hours for reply, the Italian government adopted a course which has caused it to be generally and severely criticised by writers on international law. It left the impression that the Italian designs were from the outset aggressive and imperialistic; that Italy was determined to annex the Turkish provinces in spite of whatever concessions Turkey might offer; and that she desired to forestall possible mediatory action of third powers by suddenly confronting Europe with a *fait accompli*.

Having declared war upon Turkey, Italy was free to attack her anywhere; in Europe, Asia or Africa and anywhere upon the high seas, but since Italy's principal objective was the occupation of Tripoli and Cyrenaica she decided to confine the theater of hostilities to these latter territories. This localization of the area of hostilities was doubtless due to the fear that if the war was directed against the Turkish territories in Europe and Asia it would lead to European complications and possibly the intervention of the powers. Accordingly, on September 25, already before the delivery of the ultimatum to Turkey, the Italian government addressed a telegram to its legations and consulates in the Balkan states in which it declared that its policy would be the maintenance of the *status quo* in the Balkans and European Turkey. During the early days of the war some minor naval operations took place on the Albanian and Epirot coasts, but in consequence of the emotion which they aroused in Europe, and especially in Austria, the Italian government gave orders to its naval commanders in the Adriatic

appears that hostilities were begun before the declaration of war was notified. Where, however, there is both an ultimatum and a formal declaration, as was the case here, it would seem to be legitimate to begin the war upon the expiration of the delay fixed by the ultimatum, even if it preceded the notification of the declaration, because according to the Hague Convention a formal declaration is not required where there is an ultimatum with a conditional declaration. Compare an article by Rapisardi-Mirabelli entitled *Der Italiensch-türkisch Krieg* in Niemeyer and Strupp's *Jahrbuch des Völkerrechts* for 1913.

to abstain absolutely from all further operations on these coasts. The Turkish possessions in Europe were never attacked and aside from the occupation of several islands in the Aegean Sea, Turkey in Asia was not embraced within the theater of hostilities.<sup>1</sup>

Passing now to a consideration of the legal effects of the outbreak of the war<sup>2</sup> it may be remarked that the Ottoman government announced upon the outbreak of hostilities that all treaties between Italy and Turkey would be regarded as "annulled." Among the treaties thus denounced were the capitulations, in so far as they affected Italian subjects resident in the Ottoman Empire. In consequence, Italian subjects were not entitled to the immunities from local jurisdiction which those agreements conferred in time of peace. The question of the effect of war upon the capitulations had arisen in 1897 during the war between Greece and Turkey, when it was maintained by the representatives of England and France that the privileges which the Greeks enjoyed under the capitulations were not derived from a simple bilateral convention, but from engagements between Turkey on the one side and England and France on the other, and that the war between Greece and Turkey did not terminate these engagements.<sup>3</sup> During the negotiations which ended the Crimean war, the Austrian plenipotentiary had maintained that the capitulations were permanent and unaffected by a war in which Turkey was a

<sup>1</sup> Coquet, 20 *Rev. Gén.*, p. 274: and Rapisardi-Mirabelli, 44 *Rev. Gén. de Dr. Int. Pub.*, p. 426. Egypt, Cyprus and Crete, though nominally a part of the Turkish Empire were treated as neutral territories because they were either occupied by Great Britain, or, as in the case of Crete, were under the joint control of several powers.

<sup>2</sup> Germany took over the protection of Italian subjects who remained in Turkey and of Ottoman subjects who remained in Italy after the outbreak of the war, except that in Albania and Macedonia where there were no German consulates. Austria-Hungary took charge of the protection of Italians. The action of Germany in assuming protection of the nationals of both belligerents is said to have been without precedent.

<sup>3</sup> Compare Politis in 9 *Rev. Gén.*, pp. 102 ff.

belligerent, but the treaty of San Stefano in expressly reviving them was apparently based on the theory that they had been terminated by the war.<sup>1</sup> It is hardly possible, therefore, to deduce any conclusions from these historical precedents as to the effect of war upon the capitulations. In any case, the closing of the Italian consulates in Turkey upon the outbreak of hostilities rendered the application of the capitulations impossible so far as Italian subjects were concerned. In effect therefore, it made little difference whether they were regarded as suspended or still in force.<sup>2</sup> By the terms of article 5 of the treaty of peace all the treaties between the two countries, including the capitulations, were revived and put into effect.

As to the treatment by each belligerent of enemy subjects found in its territory at the outbreak of war, the Italian declaration of war announced that Ottoman subjects would be allowed to continue to reside in Italy "without fearing an attack on their person, property or affairs," and there appear to have been no complaints on the part of the Ottoman government in respect to the maltreatment of its nationals who remained in Italy. The Porte, on the other hand, made no such promise in respect to Italian subjects. In 1877 and in 1897 it had asserted the right to expel enemy subjects *en masse*, and upon the outbreak of the latter war it actually resorted to this extreme

<sup>1</sup> Jacomet, *La Guerre et les Traités* (1909), p. 135.

<sup>2</sup> Compare Rapisardi-Mirabelli, 44 *Rev. de Dr. Int. Pub.*, p. 441. The question of the status of the capitulations during the Turco-Italian War is fully examined by M. Lémonon in an article entitled "*Les Capitulations en Turquie et en Egypt pendant la Guerre Italo-Turque*," 45 *Rev. de Droit Int. Pub.*, pp. 471 ff. His conclusion is that the policy adopted by the Turkish government "appears difficult to justify." The Turkish government, he says, should have maintained the Italian capitulations and recognized the immunity of Italian subjects from trial in the Turkish courts. See also the important treatise of Mr. Pelissie du Rausas entitled "*Le Régime des Capitulations dans l'Empire Ottoman*" (Paris, 1911, 2 vols.) and Tambaro, *Die rechtliche Stellung der Italiener in der Türkei Während des Tripolis-Krieges* in Niemeyer and Strupp's *Jahrbuch des Völkerrechts*, Vol. I, pp. 712 ff.



measure.<sup>1</sup> During the early weeks of the Turco-Italian war the Porte was content with individual expulsions of Italians who were considered dangerous to the public security. Although maintaining from the outset the right of expulsion *en masse* as a legitimate measure of reprisal against Italy for her declaration of war, the measure was deferred from time to time, apparently at the instance of the German ambassador at Constantinople. In the meantime, the Italian government complained that the Ottoman government dismissed Italian functionaries from the public service<sup>2</sup> and suspended the payment of salaries and pensions due to Italian nationals in Turkey; that it sequestered Italian merchandise in Turkish ports; closed Italian houses of commerce at Saloniki; organized a systematic boycott of Italian merchandise and imposed an *ad valorem* customs duty of 100 per cent. on the importation of Italian goods.<sup>3</sup>

Finally, the Ottoman government after having expelled large numbers of Italians from Syria and Palestine (February, 1912) issued (May 23, 1912) a general order of expulsion of all Italians remaining in the Empire, except widows, old men, priests, directors of hospitals, surgeons and Italian laborers on Turkish railways. A period of fifteen days was allowed those to whom the decree applied to leave the country. It was estimated that the total number of Italians residing in the Ottoman Empire at the time was not less than 50,000, of whom 12,000 were at Constantinople. Large numbers of them were descendants of Italians who had settled in the country several generations earlier, and many of them, in fact, had lost their Italian nationality and were in no way attached to Italy.

<sup>1</sup> Politis, 4 *Rev. Gén.* (1897), p. 525.

<sup>2</sup> By the terms of the treaty of peace, however, Turkey agreed to restore them to their positions with all rights of pay on leave and without interruption of their rights to retiring pensions.

<sup>3</sup> Rapisardi-Mirabelli, art. cited, p. 446. It may be remarked in this connection that the Ottoman government did not, as is the usual practice, forbid trade with the enemy. It followed the practice of Japan during her wars with China and Russia and allowed commercial relations between

Italian writers like Rapisardi-Mirabelli<sup>1</sup> admitted that the Ottoman government was within its legal rights in resorting to this extreme and harsh measure, although they denied that there were any reasons of supreme military necessity which justified it. Had the Turkish government been unable to protect the Italians against the violence of the inhabitants, the expulsion would have been justifiable for this reason but it was denied that this was the motive. Its own defense was that the measure was intended as an act of reprisal against Italy for having declared war against Turkey without just cause and for having violated the laws of war in numerous cases.<sup>2</sup> The real motive was doubtless political. The Italian naval forces had lately occupied the Aegean islands; powerless to prevent an act which had seriously affected the prestige of the Turkish government in the popular mind it felt obliged to furnish some evidence of energy, which would revive and strengthen the national patriotism. The wholesale expulsion of the Italians appeared to be the only measure which would accomplish this purpose.<sup>3</sup>

Turning now to the conduct of the belligerents in the prosecution of their operations on land, it may be pointed out that both were parties to the Declaration of St. Petersburg; to the Hague Convention of 1899 respecting the laws and customs of

Turkey and Italy, subject to the above-mentioned 100 per cent. surtax on Italian imports. In this way it endeavoured to reconcile the interests of its own nationals, with those of the treasury and its desire for reprisals.

<sup>1</sup> *Loc. cit.*, p. 447.

<sup>2</sup> In a circular to the powers justifying the general expulsion, the Ottoman government charged the Italians with having bombarded, with artillery, open cities; with having launched bombs from aeroplanes upon the non-combatant population and upon ambulances; with having made prisoners of war of non-combatant crews and passengers taken from neutral vessels; with having seized hospital ships; etc. These and other acts, the circular pointed out, were for the most part, forbidden by the Hague regulations, while the decree of expulsion was a measure against which the Hague Conference had refused to pronounce condemnation. Text of the circular in the *Temps* of May 23, 1912; also Coquet, *loc. cit.*, p. 417. Rapisardi-Mirabelli characterizes these charges as "pretended" or "imaginary" violations. *Loc. cit.*, p. 448.

<sup>3</sup> Compare Coquet, *loc. cit.*, p. 418.

war on land, though not to the corresponding Convention of 1907; to the declarations of 1899 relative to the use of expanding bullets and projectiles the object of which is the diffusion of asphyxiating or deleterious gases,<sup>1</sup> and to the Geneva Convention of 1906.<sup>2</sup> In conformity with the requirements of the Hague Convention the Italian government had in December, 1900, published throughout the kingdom the Hague Convention of 1899 relative to the laws and customs of war on land, for the information and guidance of its army, and by two laws passed in 1902 and 1904, it had provided the measures necessary for the organization of a 'prisoners of war information bureau' and for giving effect to the Hague regulations respecting wills and testamentary dispositions of prisoners. A law had also been passed in 1912 to give effect to the provisions of the Geneva Convention relative to the protection of the Red Cross insignia.<sup>3</sup> It may be added also that in 1896 the Italian government, following the example of the U.S. in 1863, had issued a service manual containing regulations for the information and guidance of its armies in time of war. This manual reproduced in substance the law of war on land as they were generally accepted at the time. When, therefore, Italy found herself in war with Turkey in 1911, she had a body of positive municipal law sufficiently elaborate and in conformity with the international law of war to justify the statement that she had done all that was required by the international conventions and even more than had been done by many states.

It remains now to inquire how far she observed the requirements of the law by which she was thus bound. The Italian

<sup>1</sup> The Declaration of 1899 relative to the launching of explosives from balloons had expired in 1904 and the renewed Declaration of 1907 had not been signed by Italy and various other powers.

<sup>2</sup> Turkey, as is well known, had adhered to the Geneva Convention under reserve of the right to substitute the Red Crescent in the place of the Red Cross.

<sup>3</sup> Rapisardi-Mirabelli, 45 *Rev. de Droit Int. Pub.*, p. 546, and Coquet 20 *Rev. Gén.*, p. 514.

army in Tripoli and Cyrenaica consisted for the most part of regular troops and these were nationals of Italy. Several battalions of Arabs of Cyrenaica and some blacks from the Italian colony of Erythrea were, however, organized. The Turkish armies, on the contrary, consisted of irregular indigenous troops recruited from the semi-barbarous tribes of North-Africa. Although entitled to be treated as lawful combatants, so long as they conformed to the requirements of the Hague convention, they were certainly not troops from whom could be expected a high standard of conduct in their operations. At the outset, the Ottoman government complained of the cruel treatment which its Arab volunteers received at the hands of the Italians and particularly of the alleged refusal of the Italian commanders to treat them as lawful combatants. Large numbers of them, it was alleged, were summarily executed, notably in the provinces of Tripoli and Benghazi, for no other offense than taking up arms and resisting an invader. Against this treatment the Porte addressed an energetic protest to the powers.<sup>1</sup> The basis of the protest was that according to the Hague Convention the inhabitants of non-occupied territory have an undoubted right to take up arms spontaneously when they have not had sufficient time to organize themselves, and to resist the approach of an invader, and in such a case they are entitled to be regarded as lawful belligerents provided they carry their arms openly and respect the laws and customs of war.<sup>2</sup> The Italians, on their part, contended that this right of resistance existed only in territory not yet occupied by the enemy and that it had reference only to resistance against an invader and did not embrace the right of insurrection against the authority of a military occupant. The Italians claimed that they were in occupation of the

<sup>1</sup> Text of the protest in the *Journal des Débats* of Nov. 30, 1911. See also Coquet, 20 *Rev. Gén.*, p. 517.

<sup>2</sup> Article 2, of the Convention respecting the laws and customs of war on land. The Ottoman government complained not only of the

territories where the alleged massacres took place, that the inhabitants had no right to resist their authority, but on the contrary, were bound to obey and respect it; that their resistance was an insurrection against that authority and, in consequence, the participants were not entitled to be treated as lawful combatants but as rebels. The Italians were therefore justified in resorting to reprisals and measures of severity to repress the revolt and compel respect for their authority. As to the right of the inhabitants of territory already occupied by the enemy to take up arms spontaneously and resist the authority of the military occupant, the Hague Convention is silent. The concession which it expressly makes in respect to spontaneous resistance is limited to territory *not occupied*. Neither at the Brussels Conference nor at the Hague were the powers able to reach an agreement as to the right of resistance in *occupied* territory and the question was left open. In the preamble to the Hague Convention, however, it was declared that in cases not covered by the regulations agreed upon, "populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." Invoking this declaration, the Ottoman government maintained that the inhabitants of Tripoli and Cyrenaica had a lawful right,

refusal of the Italians to treat their Arab captives as lawful combatants but that they "shot without quarter and without distinction of age or sex," peaceable non-combatants, inaugurated a reign of terror among the inoffensive civil population, burned their houses, maltreated the sick and wounded, deported thousands to Italy and committed numerous atrocities in violation of the Hague Convention and the laws of humanity, while the Turkish troops, on their part, had respected the laws of war and had refrained from acts of reprisals against the enemy. Rapisardi-Mirabelli, an Italian writer (*loc. cit.*, pp. 558 ff.), denies the atrocity charges made by the Ottoman government, accused the Turks of various acts in violation of the laws of war and defended the acts of the Italian military authorities. The deportation to Italy of the Arab captives was, he says, a necessary military precaution; they were in part, he adds, repatriated before the end of the war.

and indeed it was their duty, to take up arms for the defense of their country against an enemy, which, in violation of its treaties and contrary to international law, had invaded it with the avowed purpose of annexing it. They were, therefore, not rebels or criminals but patriots and lawful combatants and entitled to be treated as prisoners of war when captured by the enemy. Writers on international law are not lacking who support this view, subject only to the reserve that the combatants in such a case must bear their arms openly and conform to the laws and usages of civilized warfare.<sup>1</sup> The larger number of writers, however, support the view adopted by the Italians that the inhabitants of *occupied* territory who take up arms and resist the authority of the occupant are not entitled to be treated as lawful combatants.<sup>2</sup> The discussions at the first Hague Conference and the deliberate refusal of the Conference to adopt an amendment proposed by Sir John Ardah expressly recognizing the right in question seem to indicate that the convention as finally adopted was not intended to concede the right. So far as the evidence available indicates, the Italians do not appear to have refused belligerent rights to Arab soldiers in *non-occupied* territory who were not guilty of violations

<sup>1</sup> Compare Pillet, *Les Lois Actuelles*, Sec. 21; Merignhac, *Traité*, Vol. III, pp. 150 ff.; Despagnet, de Boeck, *Cours de Droit Int. Public*, 4th ed., sec. 575; Boidin, *Les Lois de la Guerre*, etc., pp. 75 ff.

<sup>2</sup> The Italian contention is set forth by Rapisardi-Mirabelli, *loc. cit.*, pp. 554 ff. See also Bonfils-Fauchille, *Droit Int. Pub.*, Vol. II, sec. 1153; Spaight, *op. cit.*, p. 53; Guelle, *Précis des Lois de la Guerre*, Vol. II, p. 67; Ferraud-Giraud, p. 16; Bluntschli, *Droit Int. Cod.*, Art. 643; Funck-Brentano et Sorel, *Précis*, p. 282; Oppenheim, *op. cit.*, Vol. II (3rd ed.), p. 107; Von Litz, *Das Völkerrecht* (9th ed.), p. 301; and Nys, *Le Droit Int.*, Vol. III, p. 108. Oppenheim denies the right of resistance even before the invasion has ripened into occupation and Spaight asserts that "inhabitants who rise in occupied territory have no rights under international agreement." "Conventional law," he says, "deals with them as it deals with spies, on the broad principle that he who tries and fails is entitled to no consideration." This is also the view set forth in the German *Kriegsbrauch im Land Kriege* (Carpentier's translation, p. 116) and in the American Instructions of 1863 (Art. 85).

of the laws of war.<sup>1</sup> But in those parts of Tripoli which they regarded as "occupied" territory and where they suffered heavily from the resistance of the natives, they adopted severe measures of repression. They not only punished summarily Arabs found guilty of acts forbidden by the laws of war (and considering the state of civilization of the inhabitants it is not surprising that such acts were numerous), but they refused to recognize as lawful belligerents those who did not fight openly, or who, after firing upon the Italians from places of concealment, threw away their arms and pretended to be non-combatants. Orders were issued requiring the inhabitants under penalty of death to deliver up their arms and in certain zones the circulation of the inhabitants was forbidden. These were unquestionably legitimate measures for a military occupant to take. The conduct of the Italians, however, in executing in October 1911, before the formal annexation of Tripoli, a large number of Arabs who had taken up arms openly and in groups and who were subsequently captured in battle, caused a lively emotion not only in Turkey, but throughout the civilized world.<sup>2</sup> Those who were taken prisoners were tried by court martial but orders were also given to shoot on the spot Arabs found with arms in their hands, and considerable numbers appear to have met this fate. Thus the Italian military commanders proceeded on the assumption that, although Tripoli and Cyrenaica had not yet been formally annexed, they constituted territory under effective military

<sup>1</sup> The Italian general in command (Caneva), in a telegram to Signor Giolitti, formally denied the Turkish charge that the Italians had refused to recognize the Arabs as lawful belligerents. Only those who were not incorporated in the Turkish forces and who were guilty of ambushing attacks and similar acts, he claimed, were denied such treatment. Text in *Le Temps*, Nov. 9, 1911, and Coquet, *loc. cit.*, p. 521.

<sup>2</sup> See Coquet, *loc. cit.*, p. 523, for the details. Rapisardi-Mirabelli, *loc. cit.*, p. 554, claims that the Arabs who attacked the Italians belonged to the non-belligerent civil population and that they inflicted serious losses on the Italians. It was, he says, a pure case of revolt in occupied territory and justified the severest reprisals.

occupation, and the inhabitants who took up arms, even openly, and resisted the occupying authority were not entitled to be treated as lawful belligerents. As stated above, there is a difference of opinion as to the right of resistance in such a case, but the preponderance of authority is against it, and in view of the silence of the international conventions in regard to the matter, we hardly seem warranted in denouncing the conduct of the Italians as contrary to international law, assuming, of course, that their occupation was effectively established and proclaimed and that the measures which they adopted did not degenerate into massacre of the inoffensive population.

Other charges and counter-charges of violations of the laws of war were made by each belligerent against the other. The Arabs were accused of torturing and massacring their prisoners, of refusing quarter, of mutilating the bodies of their dead enemies, of firing upon ambulances and hospitals, of employing dum dum bullets and of committing numerous atrocities.<sup>1</sup> It is not possible to verify the truth of the accusations, but considering the semi-barbarous character of the troops against whom they were made it may be safely assumed that they were not without foundation. The Italians, on their part, were likewise accused of numerous violations of the laws of war, some of which have already been referred to. In addition to those mentioned, they were charged with various cruelties against their enemies, with maltreating prisoners,<sup>2</sup> with employing forbidden bullets, with disregarding the Geneva Convention, with the employment of dogs as combatants, and the like.

<sup>1</sup> The charges are detailed by Rapisardi-Mirabelli in 45 *Rev. de Droit Int. Pub.*, pp. 561 ff. See also Coquet, 19 *Rev. Gén.*, p. 417 and 20 *Rev. Gén.*, pp. 528-529. See also the semi-official statements of the Italian and Turkish cases in Barclay, *op. cit.*, pp. 114 ff.

<sup>2</sup> The number of prisoners taken during the Turco-Italian war was very small. According to a report of the Italian minister of war published in the *Temps* of July 19, 1912, the number held by the Italians was only 1,741. The number captured by the Turks was still smaller.



The war was unique in being the first one in which aeroplanes and dirigibles were employed. They were used by the Italians not only for the purpose of making reconnoissances, carrying dispatches, etc., but also for purposes of combat. The Ottoman government complained and protested that Italian aviators were guilty of launching bombs upon hospitals, sanitary establishments and upon places occupied only by non-combatants. Rapisardi-Mirabelli denies the charge as to the dropping of bombs upon hospitals though he admits that they were dropped upon Arab tents which sheltered not only soldiers, but also their families. He argues, however, and it would seem to be a legitimate contention, that the presence of non-combatant persons in a military camp does not protect it against bombardment.<sup>1</sup> The Hague Declaration of 1899 forbidding the launching of projectiles and explosives from balloons had expired in 1904 and the renewed declaration had not been ratified by Turkey or even signed by Italy. The declaration was not therefore binding upon either belligerent so that whatever may be the facts in regard to the charges against the Italians for having launched bombs upon the civil population it cannot be said that they violated any international engagement.

The action of the Italian government in proclaiming the annexation of Tripoli and Cyrenaica by a decree of November 5, 1911, little more than a month after the outbreak of the war, raised an important question of international law which was the subject of much discussion and which provoked a spirited protest on the part of the Ottoman government. The text of the decree announcing the annexation was communicated to the

Those captured by the Italians were transported to Italy; those taken by the Turks were held in Tripoli. The sick and wounded who fell into the hands of the Italians were cared for by the Italian Red Cross society, offers of assistance from the German and Austrian Red Cross societies being declined. The Turkish Red Cross organization was inadequate and the Italian government gave permission to various neutral societies to come to the assistance of the Turks.

<sup>1</sup> 45 *Rev. de Droit Int. Pub.*, p. 567.

powers on the same day on which it was promulgated.<sup>1</sup> In this communication the Italian government undertook to justify the annexation on the ground that its military forces had already occupied the principal towns of the two provinces, that the constant success of the Italian armies made further resistance on the part of Turkey useless, and that, in order "to avoid the effusion of blood, it was urgent to dispel any dangerous uncertainty in the minds of the population of these regions." It was further added that "any less radical solution which left even the shadow of nominal sovereignty to the Sultan over these provinces would have been a permanent cause for future conflicts between Italy and Turkey." The solution adopted, therefore, was the "only one which definitely safe-guarded the interests of Italy, of Europe and even of Turkey"; and the hope was expressed that "the great powers' work of concord would bring Turkey to take without delay wise decisions and resolutions responding to her true interests and those of the whole civilized world." No official acknowledgment of the communication appears to have been made by any of the powers to which it was addressed, but since the annexation meant the termination of their extraterritorial rights in the two provinces, under the Turkish capitulations, they were directly affected by the annexation. Sir Edward Grey stated in the House of Commons that His Majesty's government did not admit that any of its treaty rights in the provinces were being permanently impaired, and that it reserved for future examination the question of whether British rights were likely to be affected.<sup>2</sup> Practice, however, warrants the conclusion that the annexation by one state of a part of the territory of another state puts an end to treaties

<sup>1</sup> Text of the decree in Barclay, *op. cit.*, p. 114: text of the communication to the powers in *Rivista di Diritto Internazionale*, 1912, p. 567.

<sup>2</sup> Barclay, p. 41.

between the state annexed and other states in so far as they apply to the territory annexed.<sup>1</sup> Assuming, therefore, that the annexation of the Turkish provinces was legal, other powers could hardly demand that the privileges granted by Turkey for the benefit of their nationals in the provinces annexed must be recognized and respected by Italy as the successor of Turkey therein.

In the protest which the Ottoman government addressed to the powers on Nov. 7, the annexation was denounced as "null and valueless, both juridically and in fact." It was void because it was "contrary to the most elementary principles of international law, and equally so, because Turkey and Italy were still in a state of war and because the Turkish government was resolved to preserve and defend by force of arms its sovereign rights." Furthermore, it was a violation of Italy's treaty engagements as they were expressed in the treaties of Paris and Berlin."<sup>2</sup> Italian jurists generally defended the legality of the annexation both on grounds of historical precedent (for example the English and Boer annexations during the South African War) and upon the basis of international law. The avowed object of the war was the acquisition of the provinces in question; the right of a sovereign state to make war and to acquire by conquest enemy territory was universally recognized; in pursuance of this right Italy had declared war upon Turkey, her armies were in occupation of the principal towns of the provinces in question and her ultimate and complete victory was only a matter of time. The decree of annexation therefore merely converted a situation of fact into one of law.<sup>3</sup> Writers of international law outside

<sup>1</sup> This was the view adopted, for example, in the cases of Texas, Hawaii, Madagascar and other annexed territories.

<sup>2</sup> Text of the Turkish protest in Barclay, p. 42.

<sup>3</sup> The Italian case is presented by Rapisardi-Mirabelli in 45 *Rev. de Droit Int. Pub.*, pp. 527 ff.; by Fedozzi in the *Rivista di Diritto Internazionale*, 1912, fasc. 1; by Marinoni, *ibid*, fasc. 8; and by

of Italy, however, criticized the annexation as null and void, not only because it was in flagrant violation of treaty engagements, but because it was premature. The occupation not having been complete and Turkey not having been defeated at the time, the annexation was that of a mere invader rather than that of a military occupant who had in fact extinguished the sovereignty of the parent state in the territories annexed. The precedents of the Boer and British annexations in 1899 relied upon in part by the Italians, were, it was argued, not conclusive because they were themselves premature and therefore not legally justifiable.<sup>1</sup> The legality of the annexation was also attacked by the well-known Italian jurist, Anzilotti,<sup>2</sup> who defended the thesis that a belligerent can acquire sovereignty over occupied enemy territory only through a treaty of cession with the enemy state, and not by a unilateral act in the form of a decree or legislative act.<sup>3</sup> This is the view of most writers on international law. They hold that military occupation is temporary and provisional in character and that the occupant acquires full sovereignty over the territory only at the end of the war and by a treaty of cession or by virtue of the *debellatio* of the other belligerent, who, being completely beaten, tacitly acquiesces in the annexation of the

Schanzer, *L'Acquisto delle Colonie e il Diritto Pubblico Italiano* (1912), pp. 89 ff.

<sup>1</sup> The case against the Italian annexation is presented by Barclay (*op. cit.*, Ch. 3), who pronounces the annexation to have been not only a breach of treaty engagements but as in itself illegal. It was in law nothing more than a "mere expression of intention to which the Italian government could only give effect after arrangement with Turkey and the other signatories of the treaty of 1856."

<sup>2</sup> See his article in the *Rivista di Diritto Internazionale*, 1912, pp. 11 ff.

<sup>3</sup> Rapisardi-Mirabelli (*loc. cit.*, p. 531) attacks Anzilotti's view on the ground that he failed to distinguish between the case of a war whose avowed object was the annexation of a particular territory, such as the present war, and a war whose object was different. In the former case, occupation of the territory immediately results in the displacement of the existing sovereign and no treaty of cession is necessary; in the latter case it is.

territory occupied.<sup>1</sup> Tested by this rule, the annexation by Italy of the Turkish provinces cannot be defended. But admitting that it was premature and therefore illegal the decree hardly altered the actual or even the legal situation. Before the decree was promulgated the Italians had already adopted the policy of refusing belligerent rights to the Arab forces in the territories occupied and of treating them as rebels, and the decree did not therefore, involve any change of policy in respect to the status and rights of the inhabitants.

We turn now to a consideration of the questions of international maritime law, raised during the war. Both belligerents, as already stated, were parties to the Declaration of Paris, and of the Hague Convention of 1899 for the adaptation to maritime war of the principles of the Geneva Convention of 1864. Neither, however, was a party to any of the Hague Conventions of 1907 nor to the Declaration of London. But Italy already possessed a considerable body of positive municipal law governing the conduct of maritime warfare. She had a merchant marine code dating from 1877, a part of which contained rules of maritime law to be applied in time of war; a naval service *réglement* had been issued in 1898; and in 1908 the ministry of marine had issued and published a collection entitled "rules of international maritime law in time of war," (295 articles), for the information and guidance of naval commanders. It is one of the most complete and best arranged naval codes that has been issued by any government. The collection was frequently cited by the Italian prize commission during the war with Turkey although it denied that the "rules" had any legal force.<sup>2</sup> On October 13, 1911, soon after the outbreak of the war, "instructions" were issued by the minister

<sup>1</sup> Compare Bonfils-Fauchille, *op. cit.*, Secs. 1157, 1159; Hall, "Int. Law" (3rd ed.), p. 464; Spaight, *War Rights on Land*, p. 322; and Hyde, *Int. Law*, Vol. I, p. 178, and Vol. II, p. 362.

<sup>2</sup> It so declared in the case of the *Newa*, decided, May 20, 1912.

of marine to naval commanders, respecting the right of capture and prize during the existing war. The royal decree approving the instructions stated that they were in conformity with the Declaration of Paris and with the principles laid down in the Hague Conventions of 1907 as well as with the Declaration of London of 1909, which, the decree added, "the royal government desires should be equally observed in so far as the dispositions of the laws of the Kingdom allow, although they have not yet been ratified by Italy."<sup>1</sup> It may be observed in this connection that the Turco-Italian war revealed a disposition on the part of both belligerents to admit the obligations imposed by international conventions to which they were not parties. As has already been mentioned, the Italian government, in its notification to the powers of the existence of war, took occasion to say that its declaration conformed to the requirements of the Hague Convention of 1907 relative to the opening of hostilities, although Italy was not a party to that Convention, and the Turkish government in its protest to the powers against alleged violations of the laws of war by Italy invoked the provisions of the Convention of 1907 respecting the laws and customs of war on land. Again, the Italian government, in its blockade proclamation of September 29, 1911, declared that it was acting in conformity with the Declaration of London.<sup>2</sup> Finally, as stated above, in the preamble to the instructions to naval commanders it expressed a "desire" that the provisions of the Declaration of London should be observed so far as the laws of the Kingdom permitted. Did this expression of a "desire" constitute a rule which the Italian prize commission was bound to apply? The prize commission so interpreted it and in numerous cases it applied the rules of both the Hague Conventions and

<sup>1</sup> English text of the decree in Barclay, pp. 123-127; French text in 21 *Rev. Gén.*, pp. 107-109; Italian text in *Rivista di Diritto Internazionale*, 1912, pp. 562-563.

<sup>2</sup> 20 *Rev. Gén.*, p. 256, n. 1.

the Declaration of London, particularly Article 56 of the latter, which deals with transfers of flag. In the cases of the *Carthage* and *Manouba* which were adjudged by an international tribunal, the agents of the Italian government, however, argued that the Declaration of London, which the agents of the French government had invoked in support of its case, could not be appealed to because, not having been ratified by Italy, it was not in force.<sup>1</sup> The tribunal in its decision avoided expressing an opinion on the question. Italian jurists who discussed the question took the position that the Declaration was not binding as such upon the Italian government notwithstanding the "desire" expressed that it should be observed.<sup>2</sup>

In the case of the *Aghios Georghis* the Italian prize commission rejected the plea of the claimant that Article 56 of the Declaration of London could not be invoked because Italy had not ratified the Declaration and it held that the Declaration of London, as stated in its preamble, was substantially nothing more than a codification of the existing customary rules of law on the subjects with which it dealt; it was, in short, merely an interpretative declaration of usages already in force, and was therefore binding on the Italian prize commission.<sup>3</sup> Admitting the correctness of this view, which few writers do, we would be

<sup>1</sup> Cited by Coquet, in 21 *Rev. Gén.*, 111.

<sup>2</sup> Compare Fedozzi, art. cited; Anzilotti, *Rivista di Diritto Internazionale*, 1912, p. 207, 1913, p. 204, and Rapisardi-Mirabelli, 45 *Rev. de Dr. Int. Pub.*, 582, n. 4. Others are cited by Coquet, *loc. cit.*, p. iii, n. 2.

<sup>3</sup> Text of the decision in the collection of prize decisions published by the Italian government and entitled *Atti della R. Commissione delle Prede*, Vol. I, pp. 189 ff. In the case of the *Sheffield*, (*ibid* I, 232), the prize commission characterized the Declaration as "a sort of codification of pre-existing customary law" and in the case of the *Vasilios* (*ibid*, p. 387), the Declaration was said to have "concretized the most important principles of customary law in matters of maritime war." The correctness of this view of the Italian prize commission although in accord with the statement of the preamble of the Declaration of London may be seriously questioned. In fact the Declaration contained new rules of maritime law and was not a mere statement of existing customary rules. See the remarks of Coquet, 21 *Rev. Gén.*, 114.

justified in saying that the rules of the Declaration were binding upon the Italian prize commission, as much as any other customary rules of the law of nations. It would also seem that the Italian government having solemnly declared its "desire," that the Declaration should be observed during the war with Turkey, in so far as its rules were not in conflict with the laws of the kingdom, it had become a part of Italian municipal law and was therefore binding as such. But never having been formally ratified by the Italian government in accordance with the constitutional procedure for the ratification of treaties it was not binding as an international agreement.<sup>1</sup> But whatever may be the correct view as to the binding effect of the Declaration, the action of the prize commission in applying its provisions and giving neutrals the benefit thereof was highly commendable, since it revealed a disposition to give effect to international conventions which the Italian government had never ratified and by which it was not internationally bound.

Turning now to the application of the rules of maritime law in particular cases, we may begin with the treatment which each belligerent accorded to the merchant vessels of the other found in its ports at the outbreak of the war. This matter, as is well known, is regulated by one of the Hague Conventions of 1907, though it had not been ratified by either belligerent.<sup>2</sup>

<sup>1</sup> Compare Coquet 21 *Rev. Gén.*, 116. Fedozzi, (*op. cit.*, p. 13), however, maintains that the Declaration was not even binding as municipal law because the observance of it was not prescribed as an "order" but was merely the expression of a "desire." Observance of the Italian naval authorities was therefore purely a matter of discretion and not a legal obligation.

<sup>2</sup> The Italian "rules of international maritime law in time of war," however, issued in 1908, reproduced in substance the rules of the Hague Convention in respect to the treatment of enemy merchant vessels in port at the outbreak of war and the instructions issued by the minister of marine to the naval commanders on October 4, 1911, directed that Turkish merchant vessels found in Italian ports at the moment of the declaration of war or which subsequently arrived there in ignorance of the existence of hostilities, should be provided with a safe conduct to enable them to return to a home port or some other port of ulterior destination.



Immediately upon the outbreak of the war the Turkish authorities proceeded to capture and confiscate several Italian merchantmen as well as various fishing vessels and small boats engaged in local trade. No *délai de faveur* was allowed them in which to leave, as the Hague Convention recommended. By way of reprisal, the Italian government at first announced that Ottoman vessels found in Italian ports at the outbreak of war as well as those which had entered in ignorance of the existence of hostilities would be sequestered, but orders were subsequently issued directing that they should be released and furnished with safe conducts to enable them to return to their own country.<sup>1</sup> The Italian naval instructions of October 13, 1911 (Art. 1) expressly exempted "fishing boats and small coasting vessels" from capture. The action of the Ottoman government in confiscating Italian merchantmen found in Turkish ports at the beginning of the war was hardly condemnable perhaps, since Turkey had not ratified the Hague Convention which exempts such vessels from confiscation, although it was contrary to what had become an established usage. But the confiscation of Italian boats engaged in local trade and of Italian fishing boats was less defensible for the reason that the immunity of such craft had been so long recognized that it had come to be recognized as a rule of the law of nations.<sup>2</sup> The Turkish prize court, however, in a judgment confiscating several Italian barques pointed out that they were not merchant vessels engaged in international commerce and destined to a port different from that in which they were found at the outbreak of war, but were boats engaged in local Turkish commerce. They were not

<sup>1</sup> Rapisardi-Mirabeli, art. cited, p. 579. In the case of the *Chauki* the prize commission exempted from confiscation an Ottoman sail boat which arrived at Tripoli in ignorance of the outbreak of war, on Oct. 7, 1911.

<sup>2</sup> Compare the decision of the U. S. Supreme Court in the case of the *Paqueta Habana* (1898).

therefore, within the category of vessels which the Hague Convention intended to protect.<sup>1</sup>

As to enemy merchantmen encountered on the high seas, having left their last port of departure before the outbreak of war and were proceeding to an enemy port in ignorance of hostilities, the Turkish authorities disregarded the stipulations of the Hague Convention and captured them. The Italian government, however, having in its prize instructions manifested a desire that the Hague Conventions should be observed, its prize commission in passing judgment upon captures made after the outbreak of the war took into consideration the question whether the vessel at the time of capture was proceeding in ignorance of the existence of hostilities. Whenever a vessel

<sup>1</sup> Coquet, *loc. cit.*, p. 267, and Ricci-Busatti in the *Rivista di Diritto Int.*, 1912, p. 146. Coquet (p. 269) remarks that the Italian boats thus confiscated by the Turks were "attached" to Ottoman ports and that they would have possessed Ottoman rather than Italian nationality had it not been that the capitulations gave them a foreign nationality. A much discussed case was that of the *Sabah*, an Ottoman vessel captured by an Italian cruiser in an Albanian port (Turkish) at the outbreak of the war while the vessel was discharging troops, arms and munitions for the Turkish government. The prize commission confiscated the vessel on the ground that the provisions of the Hague Convention of 1907 relative to the treatment of enemy vessels found in port at the outbreak of war were not applicable to vessels found in the ports of the enemy. Moreover, the captain was not ignorant of the outbreak of war. Clearly, it was not the intention of the Hague Convention to protect enemy vessels from capture in the enemy's own ports. Nevertheless, Anzilotti attacked the decision on the ground that private property of the enemy was not liable to capture either on land or sea except as a sanction of certain interdictions. In the present case, the vessel, he argued, was taken by surprise in an enemy port and had not violated any prohibition to take the sea. It was not therefore confiscable. See his note in the *Rivista di Diritto Internazionale*, 1912, pp. 140 ff. This somewhat novel and untenable thesis was refuted by Professor Fedozzi of the University of Genoa and by Rapisardi-Mirabelli (45 *Rev. de Droit Int. Pub.*, p. 583). It would seem to be incontrovertible that in view of the silence of the international conventions and the general practice of the past, enemy merchant vessels in their own ports are liable to capture and confiscation. So far as is known, the contrary contention had never been put forward before. Compare Dupuis, *Le Droit Maritime d'Après les Confs. de la Haye et de Londres*, p. 174, and Coquet, *loc. cit.*, p. 264.

had left its port of departure after the outbreak of war, it adopted the principle of Article 43 of the Declaration of London that there was an absolute presumption that the master knew of the existence of war and threw upon him the burden of proving the contrary.<sup>1</sup> As to the capture of enemy merchant vessels generally, subject to the exceptional circumstances mentioned above, the right of capture is well established, although there has long been much sentiment in favor of its abolition. In this respect Italy occupied a unique position in that Article 211 of her merchant marine code of 1877 pronounced in favor of the inviolability of private property in maritime war. This article declares that the capture of enemy ships of commerce by Italian warships is abolished, upon condition of reciprocity of treatment by the enemy.

Was this promise of immunity binding upon the Italian government during its war with Turkey when Turkey in fact abstained, either from inability or otherwise, from capturing Italian merchantmen (except in Ottoman ports) but did not formally declare its purpose to accord the immunity? The Italian prize commission answered the question in the negative basing its conclusion on the terms of Article 211, which apparently contemplated a formal and positive declaration of intention on the part of the other belligerent, to entitle its merchant vessels to the benefit of the immunity.<sup>2</sup> In the meantime all doubt was removed by a note of the minister of foreign affairs of October 4, 1911, which, after adverting to the fact that the Turkish government had taken no action to show that it intended to refrain from the capture and confiscation of Italian merchant ships but had already seized Italian ships in Turkish ports, announced that Turkish merchant vessels with their cargoes would be captured and made prize. This announcement was incorporated in the naval instructions

<sup>1</sup> See the case of the *Newa Atti*, etc., I, 114 and the *Sabah*, *ibid*, I, 59, discussed by Coquet, *loc. cit.*, p. 268.

<sup>2</sup> Case of the *Sabah*, *Atti*, etc., Vol. I, p. 46.

issued on October 13.<sup>1</sup> Already on the day previous (Oct. 12) the Sublime Porte notified the foreign diplomatic representatives at Constantinople that the Ottoman government had decided, "conformably to the principles of international law" that Italian ships of commerce seized either in Turkish ports or on the high seas would be confiscated together with such parts of their cargoes as belonged to Italian subjects. A considerable number of Ottoman merchantmen were captured and confiscated though apparently no Italian vessels were taken by the Turkish naval forces, aside from those seized in the ports of Turkey at the outbreak of the war.<sup>2</sup> In determining the enemy or neutral character of the vessels captured by the Italians the prize commission, it may be remarked, adopted the test of nationality, rather than of domicile, and in determining nationality the flag which the ship was entitled to fly, rather than ownership was the test applied, this in accordance with the Article 57 of the Declaration of London. Thus a Cretan vessel flying the Ottoman flag of right was held to be an enemy vessel and was therefore, confiscated although the owner was an inhabitant of the island of Crete which was regarded as neutral territory during the war.<sup>3</sup> As I have pointed out in an earlier lecture, the rule of the Declaration of London which makes the flag the determining factor in respect to nationality was found to be defective because it might protect enemy-owned vessels from capture. It was in consequence of this fact that the British

<sup>1</sup> Text in Barclay, p. 123.

<sup>2</sup> From first to last some 800 vessels were either visited or captured by the Italian naval forces. Coquet, *loc. cit.*, p. 248, n. 4. See also a summary prepared by the Italian general staff, and published in French under the title: *La Marine dans la Guerre Italo-Turque* (Paris, 1913).

<sup>3</sup> See the cases of the *San Nicolai*, *Atti*, Vol. I, p. 389, and the *Nimet-Zafer*, *ibid*, p. 493, and the analysis by Coquet, *loc. cit.*, p. 249. But in the case of a Cyprian vessel which flew the Ottoman flag the prize commission held it to be a neutral vessel because the island of Cyprus though regarded as neutral, had no distinctive flag of its own, and Cyprian ships could only use the Turkish flag. Case of the *Taxiarchis*, French text of the decision, in 20 *Rev. Gén.*, p. 510.

government during the World War abrogated Article 57 so that the British prize courts would be in a position to confiscate enemy-owned vessels flying neutral flags.<sup>1</sup> The fact is, the flag is conclusive as to the real nationality of a ship only when it is an enemy flag; it is not decisive when the flag is neutral. In the cases of the *Aghios Georghios*, the *Vasilios* and the *San Nicolai* the Italian prize commission was called on to determine whether the vessels were actually flying, at the time they were captured, the flags which they were entitled to fly. The first two were flying Greek flags, the third, the flag of Crete, recognized by Italy as neutral. All three were originally Ottoman vessels which after the outbreak of the war had been transferred to the neutral flags which they were flying at the time of their capture. The prize commission adopted the rule of Article 56 of the Declaration of London which creates a presumption that transfers to neutral flags made during the war are void unless it is proved that they were not made to avoid the consequences to which enemy vessels as such are exposed. The claimants failing to produce such proof, the vessels were declared to be good prize.<sup>2</sup> These decisions were in accord with Article 56 of the Declaration of London and such was the interpretation which the French council of prizes placed upon it in the case of the *Dacia* during the World War,<sup>3</sup> but they were the subject of attack by

<sup>1</sup> As to the circumstances under which the British government abrogated Article 57, see *Int. Law and the World War*, Vol. I, p. 197.

<sup>2</sup> In the case of the *Vasilios* the prize commission held also that the transfer had not been made in conformity with the requirements of Turkish law. Moreover, the sale was simulated because the owner who was at the same time the captain of the vessel remained aboard after the sale and was the claimant before the prize commission. In the other two cases the main ground of condemnation was the absence of good faith on the part of the owners in transferring the ships to neutral flags. The cases may be found in the Italian collection of prize decisions *Atti*, etc., Vol. I, pp. 197, 251 and 387. The decisions were analyzed by Coquet, in 21 *Rev. Gén.* 248 and 252.

<sup>3</sup> Discussed in my *Int. Law and the World War*, Vol. I, pp. 194 ff.

Italian writers who criticized the prize commission for applying the rule of the Declaration of London (to which Italy was not a party), rather than the prize law of Italy and treaty stipulations between Greece and Italy. Article 56 of the London Declaration, it was pointed out, was not a rule of customary international law, but was a new rule and as such was in derogation of the Italian merchant marine code (Art. 42) and was also in conflict with a treaty of April 1, 1889, between Italy and Greece.<sup>1</sup> In regard to the liability of goods to capture, Article 58 of the Declaration of London provides that "the neutral or enemy character of merchandise found on board an enemy ship is determined by the neutral or enemy character of the owner." But this pronouncement does not solve the difficulty because it lays down no principle for determining the neutral or enemy character of the owner. As is well known, France and some other continental European states make the nationality of the owner the decisive factor while Great Britain and the United States lay the chief emphasis on domicile. During the Turco-Italian war, the Italian prize commission applied the principle of nationality. In the case of the *Aghios Georghios* the commission, adverting to the failure of the London naval conference to reach an agreement in respect to the conflicting rules of nationality and domicile, stated that the preference must be given to the former, not only because it was the more logical rule, but because Italian law had always sanctioned this principle.<sup>2</sup> Where there was

<sup>1</sup> See a brochure by B. Intrigila entitled: *Sulla illegittimità del sequestro e della cattura dei velieri "Vasilios" ad "Aghios Georghios" di bandiera ellenica* (Rome, 1913), reviewed in 20 *Rev. Gén.* 656. See also Coquet, *loc. cit.*, pp. 252-253, and Rapisardi-Mirabelli in 45 *Rev. de Dr. Int. Pub.*, p. 582, n. 4.

<sup>2</sup> But of course the term "nationality" as thus applied was understood in its legal and not in its ethnic sense. Thus in the *Orthodossia* case, the owner of the goods was Greek by race, professed the Greek religion, his ship bore a Greek name and it carried a crew of Greek seamen, but politically he was of Ottoman nationality, and as such his goods were confiscable. Likewise, the goods of an Ottoman which had

doubt as to the character of the goods the prize commission following the principle of Article 59 of the Declaration of London presumed that they were enemy goods and threw upon the owner the burden of proving the contrary.<sup>1</sup>

As during the World War, the difficult question was presented to the Italian prize commission as to the test to be applied for determining the nationality of the owner when it was a company rather than an individual. This question was raised in the case of the cargo on the *Aghios Georghios*, the owner of which was a firm at Constantinople whose directors were persons of neutral nationality (English and German). The claimants argued that the company was not an entity distinct from the members who composed it and that since these were persons of neutral nationality, the goods were not enemy goods and therefore not confiscable. The prize commission, however, rejected the identity theory and held that the test of the nationality of the company was not that of its shareholders but that of its *siège social*. Since this was Ottoman, the society was of enemy nationality and its goods were confiscable.<sup>2</sup>

Questions involving the law of blockade and contraband during the Turco-Italian war were few and comparatively

been sold to a neutral after the outbreak of hostilities when found on an enemy ship were confiscable, since it was proved that the sale was simulated. See the case of the *San Nicolai* referred to above.

<sup>1</sup> Case of the *Aghios Georghios*.

<sup>2</sup> The commission, however, admitted that if the shareholders had been exclusively English or exclusively German instead of being partly one and partly the other, its nationality, owing to the system of extra-territoriality created by the capitulations would not have been Ottoman. But being a mixed company it was neither English nor German but was Ottoman. See the discussion in Coquet, *loc. cit.*, pp. 255-256, and Polyvios, *De la Condition légale des Sociétés Etrangères dans l'Empire Ottoman* (Paris, 1913). Compare in this connection the decision of the English House of Lords in the case of the *Continental Tyre and Rubber Company v. Duimler* during the World War (discussed in my *Int. Law and the World War*, Vol. I, p. 218), where the rule was laid down that it is permissible to go behind the corporation and ascertain its national character by the nationality of its shareholders. The French courts adopted the same rule during the World War.

unimportant. On the day on which war was declared, the Italian government proclaimed a blockade of the coast of Tripoli and subsequently a blockade of a part of the coast of the Red Sea was established. Both declarations announced the date on which the blockade was to take effect, prescribed the geographical limits within which it was to be applicable; and gave due notice to neutral powers, all in accordance with the requirements of the Declaration of London. Although the Declaration of London does not require a *délai* within which neutral vessels in the blockaded part shall be allowed to leave, it has become an established usage to grant it and the commanders of the Italian blockading forces were authorized in their discretion to allow it. In view of the great extent of the coast to which the blockade applied (about 1,000 miles) there was some question as to whether it was effective.<sup>1</sup> But considering the fact that the coast blockaded had few accessible ports, the task of maintaining an effective blockade was relatively simple and no complaints were made that it was not effective.<sup>2</sup> In fact no important captures of vessels were made for violating the blockade.

The action of the Turkish government in April, 1912, in announcing its intention to close the Dardanelles, provoked a protest on the part of the powers, and particularly of Russia, in consequence of which the decision was rescinded.<sup>3</sup>

In connection with the exercise of the right of visit and search of neutral vessels the "incidents" of the *Carthage* and the *Manouba* were the most notable.<sup>4</sup> Both were French

<sup>1</sup> Compare the remarks of Barclay, *op. cit.*, p. 98.

<sup>2</sup> See Rapisardi-Mirabelli, *loc. cit.*, pp. 107-109, who claims that the blockade entirely fulfilled the requirements of the Declarations of Paris and of London in regard to effectiveness.

<sup>3</sup> See the details in Rapisardi-Mirabelli, 45 *Rev. de Droit. Int. Pub.*, pp. 109-114.

<sup>4</sup> Some commotion was created particularly in Russia in October, 1911, by a report that the Turkish government had decided to treat grain as contraband of war irrespective of its destination. The Russian government whose Black Sea trade would have been seriously affected, announced that on the basis of the Declaration of Paris and Articles 24



merchant vessels which were seized by Italian cruisers while proceeding from Marseilles to Tunis. The *Carthage* had on board an aeroplane destined to a private consignee at Tunis. The Italians considered the aeroplane as contraband of war which they suspected of being intended for the use of the Turkish military forces. The *Manouba* carried twenty-nine Turkish passengers who were alleged by the Ottoman authorities to be members of the Red Cross society, but whom the Italians suspected of being reservists returning to join the armed forces of the enemy. The captain of the *Carthage* having refused the demand of the captor to destroy the aeroplane or to deliver it to him, took the vessel into the port of Cagliari. The *Manouba* was likewise taken in and upon the refusal of the captain to surrender the Turkish passengers, they were removed. The French government promptly protested against these acts. Upon assurances, however, from the Italian government that the aeroplane was intended for exhibition purposes only, it was released. But the French government demanded reparation for what it considered an insult to the French flag and a violation of international law and of treaties between the two countries. It also demanded damages for the injuries sustained by the private parties concerned. As to the *Manouba*, the French government demanded the release of the Turks, and reparation for the offence to the French flag and for violation of the Hague and Geneva Conventions. It also demanded damages for private losses sustained. The Italian government finally released the Turkish passengers but denied its liability for

and 33 of the Declaration of London, cargoes of grain destined from Russian Black Sea ports to Italian or other ports, unless intended for the Italian government or its armed forces, were not liable to be seized as contraband and that their treatment as such by the Ottoman government would be regarded as a violation of international law for which it would be held strictly responsible. On October 13, it published a list of articles, including grain, which it purposed to treat as contraband but it was also announced that the Turkish government, though not a party to the Declaration of London, intended to conform to its provisions respecting contraband. See Barclay, *op. cit.*, p. 99.

reparation or for the damages claimed. The controversies raised by both seizures were referred to an arbitral tribunal organized out of the Hague panel. As to the arrest and detention of the *Carthage*, the tribunal held that the information in the possession of the Italian authorities concerning the ultimate destination and use of the aeroplane was not sufficient to justify the detention of the vessel and it accordingly awarded the private parties concerned an indemnity to cover their losses, although it refused to allow the claims of the French government for reparation on account of the alleged insult to the French flag. Concerning the detention of the *Manouba* and the removal of the Turks, the tribunal held that the Italians were justified in believing that the Turks on board were military persons and in removing them, although it ruled that the Italians were not within their rights in capturing the vessel and taking it into a home port, unless the captain refused to surrender the passengers demanded. No such demand of surrender having been made at the time of capture, the taking of the vessel in was not justifiable. Nevertheless, the vessel having in fact been taken in, even though illegally, the Italian authorities at Cagliari had a right to demand the surrender of the passengers and upon refusal, to detain the vessel until the demand was complied with. A small indemnity was awarded to cover the private losses sustained on account of the detention but no reparation was allowed for the alleged offense to the French flag or for violations of the Hague or Geneva Conventions.<sup>1</sup> Throughout the controversy regarding the seizure of the *Carthage*, the French government invoked the provisions of the Hague Convention of 1907 respecting the rights and duties of neutral powers in naval warfare and also the

<sup>1</sup> The English Text of the awards may be found in Scott, *The Hague Court Reports*, pp. 329-353; the French texts in 46 *Rev. de Droit Int. Pub.*, pp. 103 ff. and 109 ff. In this connection it may be remarked that the question of the competence of the Italian prize commission to award damages for losses sustained on account of unlawful seizures or detentions was resolved by the commission in the affirmative. See the discussion of the matter in Coquet, 21 *Rev. Gén.*, pp. 273 ff.

provisions of the Declaration of London so far as they were applicable. The Italian government, on the other hand, denied that they were obligatory for the reason that neither had been ratified by the Italian government and the latter had not even been ratified by the French government. In reply to this contention the French government pointed out that the Italian government had announced at the beginning of the war its desire that they should be observed and in consequence they were binding upon the Italian government not as international conventions but as part of Italian municipal law.<sup>1</sup> The arbitral tribunal as stated above, abstained from pronouncing on this point. Article 24 of the Declaration of London listed aeroplanes as conditional contraband and under Article 35 such articles are liable to capture only when destined for the use of the armed forces of the enemy. The aeroplane in question being destined to the neutral port of Tunis was not therefore liable to capture according to the rule of the Declaration. But while the Italian government had expressed its desire that the Declaration of London should be observed, the instructions issued on the 13th of October respecting the right of capture enumerated munitions of war, cannon and a few other articles as contraband, and they added the following: "and in general, everything which, without manipulation can serve for land or sea armament." Within this latter category aeroplanes could certainly be included. No distinction, such as is made by the Declaration of London, between absolute and conditional contraband was recognized by the Italian instructions. The instructions further provided that the articles mentioned above were liable to capture if it was proved that their destination was the enemy's territory or naval forces, whether transported directly or by means of transshipment or by transit overland. In treating aeroplanes as absolute contraband and applying the doctrine of

<sup>1</sup> Compare Coquet, *loc. cit.*, pp. 110-111, and Rapisardi-Mirabelli, *loc. cit.*, p. 131.

continuous voyage to their transportation, the Italian government disregarded the rule of the Declaration of London but since the Declaration was not binding as an international instrument, Italy was free to apply a different rule so long as it was not contrary to the generally accepted customary law.<sup>1</sup> The same thing was done by France and Great Britain soon after the outbreak of the European war in 1914 and there was no violation of international law in doing it.<sup>2</sup> The capture and detention of the *Carthage* it is true, was based upon suspicion rather than upon conclusive evidence that the ultimate destination of the aeroplane was the armed forces of the enemy. Article 64 of the Declaration of London gives the parties interested a right to damages unless there are sufficient motives to justify the seizure. What are sufficient motives in a particular case are not always easy of determination. But reasonable suspicion has always been considered a sufficient ground for taking a vessel in for further examination. This practice was followed by American naval commanders during the Civil War and during the war with Spain, and it was followed by British naval commanders during the World War, though there were protests against it.<sup>3</sup> The liability of the captor's

<sup>1</sup> Italian writers denied, properly, that the rules of the Declaration of London were merely declaratory of the existing customary rules of the law of nations. Compare Ruze, 46 *Rev. de Droit Int. Pub.* 122; and Anzilotti, *Rivista*, 1913, pp. 204 ff.

<sup>2</sup> In the memorandum submitted by the French government to the international naval conference at London it was declared that the contraband character of merchandise was determined by its destination and that the destination of the ship was insufficient to establish that of the goods. *Proceedings of the International Naval Conference*, p. 30.

<sup>3</sup> As to the practice during these wars, see my *Int. Law and the World War*, Vol. II, p. 293. The Supreme Court of the United States in the case of the *Olinde Rodrigues* (174 U. S. 510) said "probable cause exists when there are circumstances sufficient to warrant suspicion, though it may turn out that the facts are not sufficient to warrant condemnation." During the World War the British prize court declared in the case of the *Kronprinz Gustav Ador*, that what amounts to "probable cause" is incapable of precise determination and must be ascertained by the prize court according to the circumstances of each particular case. *British and Colonial Prize Cases* (Ed. Trehern), Vol. II, p. 419.

government for damages in case the motives are insufficient will generally deter him from making unwarrantable seizures. The Italian authorities, it may be remarked, offered to release the *Carthage* on condition that the French government would undertake to exercise a surveillance over the aeroplane after its delivery to the consignee at Tunis in order to insure that it would not fall into the hands of the Turkish military authorities. This engagement it refused to enter into.<sup>1</sup>

In the case of the *Tavignano*, a French mail steamer seized and taken to Tripoli by an Italian cruiser on the suspicion of carrying contraband, a controversy was raised as to the place of seizure. The French government contended that the seizure took place in the territorial waters of Tunis, whereas Italy contended that it was made on the high seas. The suspicion as to the presence of contraband proved to be unfounded and the vessel was released. The French government however, demanded an indemnity for the seizure and detention of the vessel. The question involved being one purely of fact, it was peculiarly susceptible to determination by an international commission

<sup>1</sup> The details regarding the *Carthage* and *Manouba* cases are set forth and the seizures justified by Ruzé in an article entitled: *Un Arbitrage Franco-Italien*, in 46 *Rev. de Droit Int. Pub. et de Lég. Comparée*, pp. 101 ff., and by Rapisardi-Mirabelli in an article in 45 *ibid*, pp. 128-138. The French view is presented in an illuminating article by M. De Boeck in an article entitled: *Les Incidents Franco-Italiens des Navires le "Carthage," le "Manouba," et le "Tavignano,"* in 39 *Clunet's Journal du Droit International Privé*, pp. 449 ff. M. De Boeck argues that Italy although not legally bound internationally by the rules of the Declaration of London was morally bound since it had announced a desire that it should be observed during the war with Turkey. The taking in of the vessel was therefore "absolutely unjustifiable" (p. 466). The detention of the mails on board the steamer was also "morally reprehensible" (p. 461). If one may criticize M. De Boeck's argument it is that he assumes that the Italian government was bound by the Declaration of London. He also argues that since the Italian instructions did not mention aeroplanes on its list of contraband articles their treatment as such was contrary to Italian law. But as pointed out above, the instructions declared "everything which could be used directly for land or sea armament" to be contraband, and aeroplanes might very properly be brought within this category.

of inquiry, following the example of Great Britain and Russia in the Dogger Bank case. The parties readily agreed to submit the dispute to such a commission and it was done, but the findings being rather inconclusive, an agreement was subsequently entered into to refer the question to the same arbitral tribunal by which the cases of the *Carthage* and the *Manouba* had been adjudged. The matter, however, was finally settled by negotiation, Italy agreeing to pay the French government a small indemnity to cover the private losses sustained.<sup>1</sup>

By way of conclusion we may say of the conduct of both belligerents that they unquestionably violated, in a number of instances, the provisions of the international conventions as well as the customary rules of the law of nations. This is not surprising; there have been no wars in which such violations have been entirely lacking and it is hardly likely that there will be any in the future. Since neither belligerent had formally bound itself by ratification to observe certain of these conventions, its non-conformity to such of their rules as were not declaratory of existing usages may be adjudged with a certain leniency. The conduct of both belligerents in announcing their acceptance of the obligations imposed by these conventions, although neither was a party to them, was highly commendable even if they did not always strictly observe them.<sup>2</sup> The most regrettable feature of the war was the conduct of Italy in resorting to arms without any effort to settle her controversy with Turkey by means of negotiation and in beginning hostilities with such precipitancy as to allow no opportunity for friendly powers to offer their good offices or mediation. So far as the prosecution of the war on

<sup>1</sup> For the details concerning the affair, see De Boeck in 39 *Clunet*, pp. 482-485. For the report of the commission and other documents relating to the case, see Scott, *Hague Court Reports*, pp. 413 ff.

<sup>2</sup> Sir Thomas Barclay considers this to have been almost the only redeeming feature of the war—a war in which, from first to last, he says, “every possible illegality was committed.” *Op. cit.*, p. 100.

sea was concerned the conduct of the Italians was, in general, irreproachable. None of their naval prizes were destroyed, Turkish merchant vessels in Italian ports at the outbreak of the war were liberally treated, the decisions of the Italian prize commission were, on the whole, in accord with the rules and spirit of the Hague Conventions and the Declaration of London, and the interferences with neutral commerce were neither numerous nor serious. The Italian operations on land were, however, less free from criticism. The formal annexation of the Turkish provinces shortly after the outbreak of the war was premature and contrary to the generally accepted view regarding the rights of an invader. The treatment of the Arab forces was severe, and at times savored of cruelty, although it was defended by the Italians as falling within their rights as military occupants and even as legitimate measures of reprisal. The conduct of the Turkish government and of its armed forces conformed even less to the requirements of the international conventions and the customs and usages of civilized warfare. The seizure of Italian merchantmen and even of fishing vessels in Turkish ports at the outbreak of the war, the expulsion *en masse* of the greater part of the Italian population from the Ottoman Empire, to say nothing of the cruelties practiced by the Arabs upon their captives, constitute the principal indictment against the Turks. Considering the low state of civilization of the Arab troops it was hardly to have been expected that they would conform to the rules of civilized warfare.<sup>1</sup> But their non-conformity caused them to be dealt with severely by their Italian captors. The Italians justified the acts of cruelty with which they were charged, on the ground that they were fighting barbarous troops who committed numerous atrocities and who did not observe the most elementary rules of civilized warfare.

<sup>1</sup> General den Beer Poortugael expressed the opinion at the time that it was unjust to require these nomads of the desert to observe laws of war which were not made for them but for civilized peoples. See his *Le Droit des Gens en Marche vers la Paix et la Guerre de Tripoli*, p. 30.

## IV.

## THE BALKAN WARS OF 1912 AND 1913.

The treaty of peace between Italy and Turkey had hardly been signed when a new war broke out between the Balkan states of Bulgaria, Servia, Montenegro and Greece, on the one side, and Turkey on the other. The causes of the war, the merits of which do not concern us here, related to the grievances of the Balkan powers against the Ottoman government on account of its policy in European Turkey, particularly in Macedonia. The war of the Balkan federation against Turkey happily was of short duration and resulted in complete victory for the allies. A treaty of peace was signed on May 30, 1913, but neither Greece nor Servia were satisfied with the territories allotted to them by the treaty and both demanded of Bulgaria, which in their opinion had received more than she was equitably entitled to, a revision of the treaty. This demand Bulgaria rejected, whereupon Greece and Servia declared war upon her and they were joined by Montenegro and also by Roumania, which had remained neutral during the first war. The Bulgarian armies were soon defeated and the war came to an end by the signing of the treaty of Bucharest on August 10, 1913.

Efforts were made by the great powers to prevent the outbreak of the first war but they were unsuccessful. Count Berchtold of Austria-Hungary proposed a court of arbitration consisting of three representatives of the great powers and two representatives of Turkey to decide the issue between Turkey and the Balkan allies, but it was not acceptable. Later, an agreement was reached among the great powers that they would act collectively at Constantinople, and Russia and Austria-Hungary were deputed to act jointly for them in an effort to prevent hostilities. In accordance with this agreement a joint note was delivered to the Balkan governments on October 8, 1912, notifying them that the powers "energetically condemned



every measure likely to cause a rupture of the peace" and that if, in spite of their warning, war should break out they would not permit any alteration in the territorial *status quo* of European Turkey.<sup>1</sup> The warning however, was ineffective, partly because it came too late and partly because it was not backed by a threat of joint military action to prevent the Balkan powers from resorting to hostilities. No agreement could be reached by the great powers because of their own mutual jealousies and rival ambitions to employ their joint forces to restrain the Balkan states from attacking Turkey and their admonitions and warnings under these circumstances were disregarded.

The outbreak of the war found all the belligerents bound by the Hague Conventions and Declarations of 1899 and also by the Geneva Convention of 1906. They had also signed the Hague Conventions of 1907 but none of them had ratified those conventions. They were not, therefore, binding except in so far as they were reproductions of the corresponding conventions of 1899 or were merely declaratory of existing customary rules of international law. The Conventions and Declarations of 1899 however, which were binding, provided a body of conventional rules which if they had been observed, would have spared the world of a war conducted in the main with little regard to conventional rules and with little respect for established usages.<sup>2</sup> Although Article 1 of the Hague

<sup>1</sup> French text of the note in Dugard, *Histoire de la Guerre Contre Les Turcs* (1913), p. 40; English text in Holt and Chilton, *The History of Europe from 1862 to 1914*, p. 488.

<sup>2</sup> There is almost no literature dealing with the interpretation and application of international law during the Balkan wars. The principal source of information so far available to students is the report of a commission appointed by the Carnegie Endowment for International Peace to inquire into the causes and conduct of the Balkan Wars (Washington, 1914, pp. 420). The commission consisted of Messrs. Josef Redlich of Austria, Baron d'Estournelles de Constant and Justin Godart of France, Dr. Walther Schücking of Germany, Mr. Francis W. Hirst and Dr. H. N. Brailsford of England, Professor Paul Milioukov of Russia and Dr. Samuel T. Dutton of the U. S. The

Convention respecting the laws and customs of war on land imposes upon the contracting powers an obligation to issue to their armed forces instructions in conformity with the regulations annexed to the said convention, it does not appear that any of the belligerents during the Balkan wars, with the exception of Bulgaria, complied with this obligation and Bulgaria's compliance was only partial.<sup>1</sup> The rules of international law governing the conduct of war were not brought to the attention of the armies and hence they had no means of becoming familiar with the obligations and restrictions which they impose. Whether the commanders were familiar with them or not, is not known. Whatever the facts as to this, there is little doubt that the instances of non-conformity to the

Commission visited the regions which had been the scene of hostilities and in spite of the refusal of the Servian government to furnish it any information and the unfriendly attitude of the Greek authorities, it succeeded in gathering a considerable amount of data in the form of official documents, depositions, letters, reports and the like. As to the value and impartiality of the report there is a difference of opinion (Compare Woolsey in 9 *Amer. Jour.*, p. 280). It at least contains a sufficient amount of information to warrant the conclusion that the laws and customs of war were systematically violated by practically all of the belligerents. The report recommended the institution of a permanent official international commission of inquiry to accompany the armies during future wars to study, observe and report upon the manner in which the belligerents observe their engagements under international conventions and conform to the customs of civilized warfare. There are some books and brochures mainly of a propagandist character but they are of little value to the student of international law. Among these may be mentioned a book entitled *Les Cruautés Bulgares en Macedoine Orientale et en Thrace, 1912-1913* (Athens, 1914) which contains a collection of documents, reports, depositions, etc., relating to alleged Bulgarian atrocities against the Greeks; a brochure entitled *Réponse à la Brochure des Professeurs des Universités d'Athènes, Atrocités Bulgares en Macedoine, par les Professeurs de l'Université de Sophia* (Sophia, 1913) and a brochure entitled *Documents sur les Atrocités Grecques, Extraits du Livre de M. le Professeur Milétitch: Atrocités Grecques en Macedoine* (Sophia, 1913). Chapter 24 of Cassavetti's *Hellas and the Balkan Wars* (London, 1913) contains a recital of alleged Bulgarian atrocities against the Greeks.

<sup>1</sup> See the Report of the Carnegie Commission, p. 212, where two Bulgarian army orders containing a few instructions relative to the rights and duties of soldiers, are reproduced.

conventions and established usages were numerous and often shocking.

The commission of inquiry appointed by the Carnegie Endowment for International Peace to investigate the causes and conduct of the war came to the conclusion that there was "no clause in international law applicable to land war and to the treatment of the wounded, which was not violated, to a greater or less extent, by all the belligerents."<sup>1</sup>

The second Balkan war began, it was asserted, by the violation on the part of Servia of a treaty engagement with Bulgaria. By this treaty, concluded before the outbreak of the first war, Servia had agreed to forego all claim in the event of victory over the Turks to certain territory in Macedonia in return for Durazzo and a part of Albania. The intervention of the great powers having deprived her of these latter territories, Servia demanded that the treaty should be revised and that Bulgaria should not insist upon the fulfilment on the part of Servia of the earlier engagements. The basis of the Servian contention was that the situation at the time of the conclusion of the treaty had been altered by the intervention of the powers and they invoked the doctrine of *rebus sic stantibus* in support of their claim that the treaty was no longer binding. They cited the various authorities who had expounded the *rebus sic stantibus* principle,<sup>2</sup> and appealed to such precedents as the Russian declaration of 1870, in respect to the Black Sea and the Austrian annexation of Bosnia and Herzegovina in 1908.<sup>3</sup> It may be doubted whether the argument drawn from the rule of *rebus sic stantibus* was really applicable to the controversy between Servia and Bulgaria,<sup>4</sup> but it must be admitted that Servia's demand for the revision of

<sup>1</sup> P. 208.

<sup>2</sup> Among others, Kauffmann's monograph, *Das Wesen des Völkerrechts und die Clausula Rebus sic Stantibus* (Tubingen, 1911).

<sup>3</sup> Carnegie Report, pp. 62 and 208.

<sup>4</sup> I have discussed in my *Int. Law and the World War*, Vol. II, p. 218, the meaning of the clause in connection with its invocation by the Germans in avoidance of the Belgian neutralization treaty of 1839.

the treaty was by no means inequitable and consequently the severe denunciation of her conduct by the Carnegie Commission would seem to be a bit extreme. But whatever may be the merits or demerits of Servia's case, the war which followed, like the preceding one, was marked by numerous atrocities and cruelties. The Carnegie report details many of them. Prisoners were tortured and massacred, dum dum bullets were employed, flags of truce were violated, the Geneva Convention was contravened by the firing upon hospitals, undefended places were bombarded, villages and towns were burned, pillage was resorted to on a large scale, worthless receipts were given for supplies requisitioned, "individual life was rated cheap and private property at nothing."<sup>1</sup> Altogether, it constitutes a sickening story and it would be out of place in a work on the "development" of international law to enter into a detailed discussion of the conduct of the belligerents in a war in which the rules of international law were so little respected. The conduct of some of the belligerents was less reprehensible than that of others,<sup>2</sup> but if the findings of the Carnegie Commission may be regarded as trustworthy, all the belligerents were serious offenders and the differences of culpability were only differences of degree.

<sup>1</sup> These and other charges are detailed in Ch. V of the report of the Commission. See also Chs. 2 and 3. The war, we are told, was carried on "not only by armies but by mobilized gangs" (p. 13); the Moslem population was proscribed, and large numbers were massacred (pp. 73-75); communities were devastated (p. 133) and atrocities of every kind were committed against the non-combatant population.

<sup>2</sup> The worst offenders appear to have been the Bulgarians and Greeks. Each side accused the other of wholesale atrocities and cruelties. It would be useless to attempt to verify or disprove the charges. Many of them were probably well-founded; others, like similar accusations in previous wars, were no doubt exaggerated or unfounded. See the charges and counter-charges of the Bulgarians and Greeks in the books and brochures mentioned in the bibliographical note above.

## LECTURE VII

### Interpretation and Application of International Law during the World War<sup>1</sup>

The Balkan Wars had hardly terminated when the Great European War broke out in August, 1914, and ultimately spread from country to country and from continent to continent, until it became a World War in which some thirty states or recognized belligerent powers participated, either actively or by declaring war without actually engaging in armed hostilities. The war differed from all others in the past, not only by reason of its magnitude and the number of belligerents which participated in it, but also by reason of its character. It was not merely a struggle between armies and navies, but in a sense it was a contest between peoples. Millions who were not fit for service in the military or naval forces were drafted into, or voluntarily engaged in, industrial or other activities which were

<sup>1</sup> The literature dealing with the interpretation and application of international law during the World War is so extensive that I must limit myself here to calling attention to the bibliography of books, brochures, pamphlets and official documents in my *International Law and the World War*, Vol. II, pp. 505-518 (1920). A goodly number of books and monographs and many articles in the journals of international law dealing with particular questions have appeared since the publication of the abovementioned list. References are made to many of them in this lecture. Unfortunately much of the literature, particularly that which appeared during the course of the war, is more or less polemic and propagandistic in character. Even jurists of neutral countries who wrote during the war found it difficult to discuss the conduct of belligerents in the spirit of impartiality and fairness. We are still, perhaps, too near the tragic events of the unhappy conflict with its numerous and flagrant violations of the law, to expect to see for some time to come, an unbiassed and judicial discussion of acts and conduct which so violently shocked the public conscience and aroused the fiercest passions throughout the world.

as necessary to the prosecution of the war as service in the ranks. In short, the entire available human power of the nations was requisitioned by or voluntarily placed at the service of their governments. The effect was to undermine in some degree the old distinction between combatants and non-combatants and to render illogical certain of the rules of international law which were based upon that distinction.<sup>1</sup>

The war differed from others in the past, not only by reason of the new and changed conditions under which it was carried on, but also because of the employment for the first time and upon a large scale of a variety of new instrumentalities and agencies of destruction, such as the submarine torpedo boat, the airship, the submarine mine, toxic gases, liquids, and other chemical substances. As to the employment of some of these instrumentalities, the law was silent or uncertain and their use led to many controversies and sometimes provoked much denunciation. Altogether, the events of the war revealed in a striking manner the inadequacy and the defects of the existing laws of war to say nothing of their lack of effective sanctions. Besides the new and novel questions of international law to which it gave rise, nearly every question raised in former wars was brought up for interpretation, often in different form, and calling for its application under new and changed conditions. For the student of international law and especially of war law, the World War was therefore one of tremendous importance. In this respect it was unique; no former war had ever produced so great a variety of new and far-reaching problems for the international jurist; and, it may be added, none ever afforded so great an opportunity for testing out the value and the efficacy of the customs and conventions governing the conduct of war.

<sup>1</sup> Compare Lawrence, *The Effect of the War on International Law*, in *Grotius Society, Problems of the War*, Vol. II, pp. 105 ff., and Fauchille, *Droit International Public, Guerre et Neutralité*, p. 108, and Oppenheim, *International Law* (3rd. ed.), Vol. II.

The outbreak of the war found all the belligerents parties to the Hague Conventions of 1899 and to the Geneva Convention, either of 1864 or 1906, and they were therefore binding upon them all. None of them, had, however, ratified the Declaration of London and as an international instrument it was not, in consequence, binding upon any of them. As to the futile efforts of the United States government to induce the belligerents at the outbreak of the war to agree to apply the Declaration, notwithstanding its non-ratification, and of their subsequent disregard of it, I have already spoken in a former lecture.<sup>1</sup> There I pointed out that while not binding in its entirety as an international act, such of its provisions as were merely declaratory of the existing customary rules of the law of nations and not innovations upon the customary law, were undoubtedly binding, as much as any other rules of customary law.

As to the Hague Conventions of 1907, it happened that at least six of the ultimate belligerents (Bulgaria, Greece, Italy, Montenegro, Servia and Turkey) had not ratified any of them. Likewise, certain of the conventions had not been ratified by Great Britain and some of the other belligerents.<sup>2</sup> In consequence, therefore, of the so-called "general participation" clause which was a part of each convention, and which stipulates that its provisions are not applicable except between the contracting parties and then only when all the belligerents are parties, none of the conventions of 1907 were binding as international acts upon any of the belligerents during the World War. Two of the most important of these conventions, however, that respecting the laws and customs of war on land and that for the adaptation of the principles of the Geneva Convention to maritime warfare were merely revisions of the corresponding conventions of 1899 which had been ratified by

<sup>1</sup> Lecture III.

<sup>2</sup> See the table of ratifications in Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 230-232.

all the belligerents. It was evidently the intention of the conference of 1907 that the revised conventions should, when duly ratified, replace, as between the contracting parties, the conventions of 1899, but that the latter should remain in force as between the ratifying powers until they had been superseded by the conventions of 1907.<sup>1</sup> The other conventions of 1907 being new acts and not merely revisions of corresponding conventions of 1899 were, for the reasons stated above, not technically binding upon any of the belligerents, except in so far as their stipulations were merely declaratory of the existing customary law of nations on the matters with which they dealt. The majority of the stipulations of the conventions of 1907 were probably of this character.<sup>2</sup> For this reason and for the further reason that the vast majority of states had ratified the conventions of 1907, it was maintained by some publicists, and this view was acted upon by several governments, that those conventions were, or should be, regarded as binding upon all belligerents as well as neutral powers during the World War. Thus at the outbreak of the war the minister of foreign affairs of Chile announced that the neutrality conventions of 1907 although not having been ratified by Chile would be regarded as binding because they embodied the "principles of international law universally recognized."<sup>3</sup> The government of the Netherlands in a controversy with Great Britain maintained in 1916 that the conventions of 1907 ought to be applied since

<sup>1</sup> Compare Scott in 9 *Amer. Jour.*, p. 193, and Fauchille, *Droit Int. Public, Guerre et Neutralité*, p. 20, and the authorities there cited. Some German writers, notably Neukamp, Liszt and Strupp, maintained that the powers which had ratified the convention of 1907 respecting the laws and customs of war on land were bound, as between themselves, by this convention, while in their relations with belligerents which had ratified only the convention of 1899, the latter alone was obligatory. But this interpretation is not in accord with the text of the convention of 1907.

<sup>2</sup> Compare Fauchille in 25 *Rev. Gén.*, p. 80; Despagnet, *La Guerre Sud-Africaine*, p. 219, and Martens, *La Paix et la Guerre*, p. 240.

<sup>3</sup> Text in Alvarez, *La Grande Guerre Européenne et la Neutralité du Chili*, pp. 157-158.



"almost all of the states of the entire world had by the fact of ratification, expressed the opinion that the dispositions elaborated at the second peace conference were in conformity with the existing law of nations."<sup>1</sup> In the diplomatic controversies between belligerents themselves and between them and neutrals, and in the arguments addressed to the prize courts, each party not infrequently maintained that the conventions of 1907 were binding, whenever its own claim would be subserved by such an interpretation, otherwise it argued that they were not binding because they had never been ratified.<sup>2</sup> Not infrequently when belligerents had occasion to invoke the benefits of a particular convention, they argued that the convention was binding; but whenever they wished to avoid the obligations which it created, they insisted that it was not legally in force. German jurists who undertook to justify various violations of the law with which Germany was charged, such as the invasion of Belgium and the bombardment of undefended towns, frequently resorted to this argument. Generally, the argument had no basis because the acts which it was designed to justify were forbidden, not merely by the Hague Conventions of 1907 but by the well established customary principles of international law. It made no difference therefore whether the conventions as such had been formally ratified or not.

It should be said to the honor of the prize courts, however, that generally they treated the conventions of 1907 as if they were legally in force and in passing upon the claims of enemy subjects and of neutrals, they gave them the benefit of any

<sup>1</sup> Notes of Jan. 30 and March 18, 1916, quoted by Fauchille, *op. cit.*, p. 18, n. 4.

<sup>2</sup> Some instances are referred to in my *International Law and the World War*, Vol. I, p. 21, n. 2. The German government in its correspondence with the British government admitted the binding force of the 11th convention and invoked the benefit of its provisions, but in a controversy with Norway relative to the seizure of mails by the German naval authorities it argued that the convention was not binding. *Brit. Parl. Paper*, Misc. No. 28 (1916), Cd. 8322, p. 9.

rights which such conventions created, especially when their own countries were parties thereto. Thus the president of the British prize court allowed enemy shipowners who claimed any right or immunity under any of the Hague Conventions to appear and defend their claims, and in passing upon the question of the liability to confiscation of German merchant vessels in English ports at the outbreak of the war, he gave the German claimants the benefit of such parts of the Convention as the German government had ratified without reservation. Instead of decreeing the confiscation of the ships, as he might have done had he been disposed to treat the convention as not being in force, he merely ordered their detention until the end of the war.

In the case of the *Möwe*<sup>1</sup> the president of the British prize court took occasion to say that the failure of a few petty states, some of which had no sea boards or navies, to ratify important international conventions which dealt mainly with maritime matters and which had received the approval of practically all the maritime powers of the world ought not to be allowed to defeat those conventions. The British prize court in Egypt adopted the same view and treated the convention invoked by the claimants as being in force.<sup>2</sup> The German supreme prize court likewise assumed that the same convention was binding upon it.<sup>3</sup>

We turn now to a consideration of the interpretation and application of the international conventions and customary rules of international law during the Great War. Manifestly, the limits of this lecture do not permit of a detailed examination of

<sup>1</sup> *British and Colonial Prize Cases* (editor Trehern), Vol. I, p. 60. See also the case of the *Prinz Adalbert*, *ibid*, Vol. II, p. 73.

<sup>2</sup> See the case of the *Barenfels*, *ibid*, Vol. I, p. 124.

<sup>3</sup> Case of the *Fenix*, *Zeitschrift für Völkerrecht*, Bd. IX, p. 103. The German supreme court of military justice also held that the Hague convention of 1907 respecting the laws and customs of war on land was binding upon it since Germany had ratified the convention, notwithstanding that it had not been ratified by all the belligerents. Clunet, 1917, p. 257.

all the multifarious questions, old and new, that arose during the war; it must suffice therefore, to review in the briefest possible manner the conduct of belligerents and neutrals and to discuss summarily the more important controversies which involved fundamental questions of international law.<sup>1</sup>

Considering first the policy of belligerents in respect to the treatment of enemy subjects found in their territories at the outbreak of the war, it may be observed at the outset that this matter is not dealt with by any of the international conventions, unless it be admitted that Article 23 of the Hague Convention respecting the laws and customs of war on land was intended as a restriction upon belligerent governments in dealing with the rights of enemy subjects. This article forbids the extinction, suspension or inadmissibility in the courts, of the rights and actions of the nationals of the adverse party. The meaning of the article has been a subject of much controversy. In England and America it had been interpreted to be merely a prohibition on the military authorities in occupied territory and this was the conclusion reached by the English courts during the World War.<sup>2</sup> On the continent and in Germany especially, it has been interpreted to be a prohibition upon the power of a belligerent government to close its courts to enemy subjects or to suspend or extinguish in any manner their legal rights.<sup>3</sup> In practice belligerents acted in accordance with the British interpretation of the article.

<sup>1</sup> The interpretation and application of international law during the war are treated with detail in my *International Law and the World War* (2 vols., 1920), and in Merignhac and Lémonon, *Le Droit des Gens et la Guerre de 1914-1918* (2 vols., 1921).

<sup>2</sup> See the case of *Porter v. Freudenberg*, 1 K. B. 856 (1915), where Lord Reading held that it was a prohibition merely on the conduct of military commanders in occupation of enemy territory and not a restriction upon belligerent governments in dealing with the rights of enemy nationals residing in the country during the war.

<sup>3</sup> The controversy is discussed in detail in my *International Law and the World War*, Vol. I, pp. 119 ff., where various opinions are cited.

The enemy alien problem during the World War differed from that of previous wars by reason of the very large numbers of such persons in nearly every belligerent country, many of whom were reservists, the existence of organized systems of espionage in some of the countries involved and by reason of the enormous property interests held by enemy subjects in the more important belligerent states. For these reasons the liberality of treatment accorded to such persons fell far short of the practice of the more recent wars. Only in a few cases were days of grace allowed them to leave the enemy country and on account of the shortness of the period allowed and difficulties of railway travel, only a comparatively small number succeeded in getting away. Enemy persons of military age were generally forbidden to leave. Later on, agreements were concluded between some of the belligerent governments for the reciprocal exchange or repatriation of the enemy aliens of non-military age, but the great mass of the enemy population was detained until after the end of the war. They were subjected to restrictions upon their liberty such as were scarcely known in any previous war. Before the war had progressed very far, most of the belligerent governments adopted the policy of wholesale internment by which practically the entire enemy alien population were removed to concentration camps and virtually held as prisoners until after the close of the war.<sup>1</sup> This extreme measure had not been adopted in any previous war during the nineteenth century but it was justified by the belligerent governments resorting to it during the World War, as a necessary measure, not only for reasons of national defense but for the

<sup>1</sup> The United States was one of the few great powers which did not adopt the policy of wholesale internment, its geographical remoteness from the enemy country making it less imperative than in the case of the European states which adopted it. The only persons interned in the United States were the crews removed from German merchant vessels in American ports at the outbreak of the war, those taken from enemy warships that came into such ports and a small number of other persons who were considered as dangerous suspects.

protection of the enemy population itself against mob outbreaks and maltreatment from the native inhabitants. The Portuguese government, following the example of Turkey during her recent wars, went to the length of expelling all enemy subjects, except males of military age, and requiring them to leave the country within fifteen days. The Japanese government appears to have been the only one which accorded enemy subjects the liberal treatment which former usage had allowed them.

Regarding the right of enemy subjects to bring actions in the courts for the enforcement of their legal rights and to defend suits brought against them, the policy of the belligerents differed. The British courts, although holding to the ancient common law rule that enemy aliens have no *persona standi in judicio*, nevertheless decided that those who were interned as civil prisoners were assumed to be in the country with the permission of the Crown and were therefore entitled to sue as plaintiffs and to defend actions brought against them by British subjects.<sup>1</sup> Since practically the entire enemy alien population belonged to this class the English courts were thus opened to the great mass of those remaining in the country. In the United States the right of access to the courts was admitted in the few cases where the question arose.<sup>2</sup> In France there was a wide difference of opinion among the jurists regarding the matter and there being no positive law on the subject and no conclusive judicial precedents, the courts were left free to adopt such policy as they saw fit. In fact, some of them denied the right of access, but others, including the Court of Appeal of Paris, allowed it.<sup>3</sup> The Court of Cassation never had occasion to pass on the question.

<sup>1</sup> See the cases of *Princess Thurn and Taxis v. Moffett*, 1 Ch. 58 (1915); *Porter v. Freudenberg*, 1 K. B. 857 (1915); and *Robinson and Company v. Continental Insurance Company of Mannheim*, 1 K. B. 155 (1915).

<sup>2</sup> See notably the case of *Schultz v. Raimés and Co.*, 166 N. Y. supp. 567 (1917).

<sup>3</sup> See the case of *Compagnie Bulgaria v. Olivier*, in *Phily. Jurisprudence Spéciale*, pp. 749 ff., and 43 *Clunet*, pp. 380 ff. As to French

The Italian government denied access to its courts of all enemy persons, even those resident in or domiciled in Italy, except those of Italian nationality.<sup>1</sup> Portugal prohibited enemy subjects not only from bringing suits in the courts, but from defending actions brought against them.<sup>2</sup> German policy was more liberal, only enemy subjects domiciled *outside* the empire being denied access to the courts as plaintiffs. No restrictions whatever were placed upon the right of enemy aliens to defend actions against them, not even as to those domiciled outside the Empire.<sup>3</sup>

In respect to the treatment of the property and business enterprises of enemy aliens the policy of all the belligerents was severe and largely unprecedented. In the more important belligerent countries these interests were very large and the severe measures adopted were based on the fear that enemy property and business undertakings if left in the hands of the owners or under control of enemy directors, would be used or conducted to the injury of the national defense of the countries in which they were situated. To prevent such an eventuality, therefore, the belligerent governments, generally, adopted the policy of sequestration by which all enemy property was seized and placed in the hands of custodians, sequestrators or managers who were charged with preserving and holding it as a sort of "economic hostage" until the end of the war when its ultimate disposition would be determined by the treaty of peace. In general, these officials were regarded merely as custodians and conservators; they were empowered to administer the property in their custody, pay debts due against it, receive

opinion and practice, see the articles by Professor Valéry in 23 *Rev. Gén.*, 1916, pp. 379 ff., and in 42 *Clunet*, pp. 1009 ff.; of Professor Barthélémy, 43 *Clunet*, pp. 1473 ff.; of Théry, in 44 *Clunet*, pp. 480 ff., and of Audinet in 27 *Rev. Gén.*, pp. 321 ff.

<sup>1</sup> See the article by Breschi in *Clunet*, 1918, p. 120, and Audinet, article cited, p. 316.

<sup>2</sup> Audinet, p. 317.

<sup>3</sup> *Clunet*, 1916, p. 1131; Audinet, p. 319; Barthélémy's article cited; and Curti in 42 *Clunet*, pp. 785 ff.

interest and dividends due on it, and the like. Generally, they were not authorized to sell the property except in cases where it was perishable, but in the United States the enemy alien custodian was empowered by an act of March 28, 1918, to sell any property in his custody, and large quantities were, in fact, so disposed of. Enemy business houses and enterprises were likewise placed under the management and supervision of controllers or other similar agents with different titles. In the United States no such controllers or administrators were appointed, but the directorates, when composed of persons of enemy nationality, were reorganized by the appointment of American directors. Whatever the differences of detail in the methods adopted, the entire management and administration of all enemy business houses, enterprises and undertakings were placed in the hands of government agents in order to insure that no such business might be conducted in a manner to benefit the enemy. In some countries, for example England, controllers were given the power to liquidate and wind up the affairs of the concerns placed under their management.<sup>1</sup> In pursuance of the measures adopted in respect to enemy property enormous quantities were seized, particularly in the United States, Great Britain, France and Germany. In the United States alone the total amount gathered in by the enemy alien custodian exceeded \$800,000,000, although it was not the policy of the American government to seize the property of enemy aliens who were actually residing in the United States (except interned persons) and who were not engaged in making war upon the country. Seizures, therefore, were limited in the main to property owned by enemy persons who were resident in enemy country and who were assumed to be engaged in making war upon the United States.

None of the belligerent governments appear to have intended that the property so seized should be confiscated outright,

<sup>1</sup> Their powers are analyzed in the *Law Times* of Nov. 4, 1916, pp. 141-142.

but rather that it should be held for the ultimate satisfaction of claims against the enemy country of which the owners were citizens or subjects, and the treaties of peace so provided.<sup>1</sup> This amounted virtually to confiscation and the requirement that the enemy governments should indemnify their nationals for the losses sustained by the appropriation of their property for this purpose hardly rendered it less so. Altogether, the policy of the belligerents in respect to the treatment of enemy aliens who were found in their territories at the outbreak of the war was characterized by a severity and rigor which constitutes a rather regrettable chapter in the history of the Great War. In many respects it was a return to the old practice of the eighteenth century which the enlightened usage of the nineteenth century had condemned. Some of the extreme measures adopted may have been justified in view of the somewhat peculiar conditions which differentiated the situation from that of all former wars but others are difficult to defend upon considerations of national security and protection. Most of the victims were in the countries where they were caught, under the faith of treaties; they were engaged in business and industry or in the practice of professions and as such they were contributors to the economic wealth of the countries where they resided; most of them, it is fair to assume, were law-abiding inhabitants and disposed to demean themselves peaceably. Large numbers of them had resided so long in the countries where they were found that they had lost attachment for their natal lands and no longer maintained relations therewith. In England no distinction was made between those who had acquired British nationality and those who had not and in France those who had acquired French nationality subsequent to 1913 were denationalized by legislative act, so that they might be subjected to the same treatment as that reserved for

<sup>1</sup> Treaty of Versailles, Art. 297, Annex, Sec. 4. The treaties of peace with Austria, Hungary, Bulgaria and Turkey contained similar dispositions.



enemy aliens. Dragged away from their homes and places of business to distant concentration camps and held virtually as prisoners during the long years of the war, denied access to the courts in some countries for the enforcement of their legal rights, their property seized and, in effect, confiscated, their hard lot was calculated to excite sympathy and even pity.<sup>1</sup>

In respect to the treatment of enemy merchant vessels found in port at the outbreak of the war the policy of the belligerents was more in accord with recent practice, perhaps because they were bound morally if not technically by an international convention which limited in some measure at least their freedom of action in dealing with such vessels. This convention (Hague, No. VI) affirms the "desirability" of allowing enemy merchant vessels, except those whose construction shows that they were intended for conversion into warships, a reasonable period in which to leave the ports in which they are caught by the outbreak of war and of according the same privilege to those which have left their last port of departure before the commencement of the war and entered an enemy port in ignorance of the outbreak of hostilities. The convention further declared that in case such a *délai* was not granted, the vessels should not be confiscated and the same treatment was to be applied to enemy merchant vessels encountered on the high seas while still ignorant of the existence of hostilities, having left their last port of departure before the commencement of the war. The outbreak of the World War found hundreds of German and Austrian vessels of commerce in enemy ports while large numbers of others were encountered on the

<sup>1</sup> The whole matter of the treatment of enemy aliens during the World War is treated in detail in my work cited above, Vol. I, Chs. III-V. See also Fauchille, *op. cit.*, Vol. II, Secs. 1055 ff., and the more special treatises of Reulos, *Manuel des Séquestrés* (1916); Eccard, *Biens et Intérêts Français en Allemagne* (1917); Troimaux, *Séquestres et Séquestrés* (1916) and the articles of Breschi, Audinet, Barthélemy, Théry and Valéry cited above. The article by Audinet contains an excellent general summary of the policies of the various belligerents.

high seas proceeding to enemy ports. France offered a *délai* of seven days to enemy ships to leave, Belgium three days, Japan two weeks and Great Britain ten days, all conditioned on reciprocity of treatment by the enemy. No assurance having been received by the British government from Germany within the period prescribed the British offer was withdrawn. Italy allowed no *délai* at all nor did the United States. Enemy vessels in the ports of the United States and Italy, however, were not ships of commerce engaged in trade and caught by the surprises of war, but were vessels which had taken refuge in their ports (then neutral) at the outbreak of the war in August, 1914, in order to escape capture. They hardly fell, therefore, within the category of ships to which the Hague Convention applied. In any case, had a *délai* been offered them, they could not have availed of it because of the certainty of capture by British or French warships which lay in wait outside the ports in which they were refugeeing.

As to enemy vessels found in British and French ports, they were given the benefit of the immunity provided for by the Hague Convention, which the prize courts treated as being in force, notwithstanding that it had not been ratified by all the belligerents, and they were therefore detained instead of being confiscated. Those of Turkey, however, were denied the benefit of the immunity because the Ottoman government had never ratified the Hague Convention. German ships in the Brazilian, Italian and Portuguese ports had already been requisitioned by those powers before they became belligerents. Those in the ports of Siam were confiscated by the prize court on the theory that they were vessels which had taken refuge there at the outbreak of the war in August, 1914, and not ships which were caught in Siamese ports when Siam became a belligerent in July, 1917. They did not, therefore, belong to the class of vessels which the Hague Convention No. VI was intended to protect against capture. Furthermore, the German government had notified the Siamese government that it did not regard

Convention No. XI as being in force since it had not been ratified by all the belligerent powers. If this Convention were not in effect, it was argued, Germany could not plead that Convention No. VI was binding.<sup>1</sup> Enemy vessels in the ports of the United States were seized by order of the President in pursuance of an act of Congress which authorized him "to take possession and title" of them, the crews were removed and interned and the vessels which had been badly damaged by the crews before the United States declared war; were repaired and some of them were operated for transport purposes during the war. They were not, however, put into the custody of the prize court, nor were they formally requisitioned or confiscated, the decision as to their ultimate disposition being deferred until the end of the war.

The prize courts which like those of Great Britain and France gave enemy owners the benefit of the Hague Convention and issued decrees of detention rather than of confiscation against the vessels which they dealt with, construed the convention strictly. The immunity, therefore, was not allowed to merchant vessels which were capable of being converted into warships and the French prize council denied it to those engaged in a public service.<sup>2</sup> It was likewise denied to German vessels which sought refuge in British ports immediately prior to the outbreak of the war with England, in order to escape capture by the naval forces of France against whom Germany had already declared war.<sup>3</sup> Similarly it was denied to racing and pleasure yachts<sup>4</sup> and to tugs, lighters and floating craft which did not fall within the category of "small boats engaged

<sup>1</sup> Text of the decisions in 45 Clunet, p. 1316, and 46 *ibid*, p. 428.

<sup>2</sup> Fauchille, *op. cit.*, Vol. II, p. 555. Text in 22 *Rev. Gén.*, Docs., p. 9.

<sup>3</sup> See the cases of the *Prinz Adalbert* and the *Kronprinzessin Cecilie*, *Brit. and Col. Prize Cases*, Vol. III, p. 70.

<sup>4</sup> Cases of the *Oriental* and the *Germania*, *ibid*, Vol. II, p. 365.

The German prize court reached the same conclusion in the case of the *Primavera*, 44 Clunet, p. 1804.

in local trade," which are exempt from capture by the terms of the eleventh Hague Convention.<sup>1</sup>

Regarding enemy merchant vessels encountered on the high seas in the circumstances mentioned above, both the British and French prize courts declined to accord the benefits of the Hague Convention to German owners, for the reason that Germany had reserved her ratification to that part of the convention which exempts such vessels from confiscation. All such vessels as were encountered by British and French cruisers in the circumstances mentioned were, therefore, confiscated and not merely detained.<sup>2</sup> Austrian merchant vessels so encountered were, however, detained rather than confiscated, Austria having ratified the convention without reservation. The German prize court likewise interpreted the immunities of the convention strictly and refused to extend its benefits to a Russian merchantman which had not actually "entered" a German port at the time of capture, but was still at sea, although it was in the mouth of the Elbe and was proceeding to a German port in ignorance of the outbreak of war.<sup>3</sup> This strict interpretation was analogous to that adopted by the British prize court in the case of the *Möwe* where it was held that a German merchant vessel captured within the waters of the Firth of Forth was not "in port" in the sense of the Hague Convention, but was "at sea."<sup>4</sup>

The final disposition of all enemy merchant vessels seized in the ports of the allied and associated powers and which had not been condemned already by the prize courts was determined by the peace conference. Germany was required to waive "all

<sup>1</sup> *Brit. and Col. Prize Cases*, III, 439, 470.

<sup>2</sup> See especially the British case of the *Marie Glaeser*, *Brit. and Col. Prize Cases*, Vol. I, p. 38, and the French cases of the *Porto*, the *Barmbek*, the *Freda Mahn*, the *Martha Bockham* and the *Csar Nicolai II*, Texts of the decisions in 22 *Rev. Gén. (1915), Jurisprudence*, pp. 1-12 and 23 *ibid*, p. 66.

<sup>3</sup> Text of the decision in 9 *Zeitschrift für Völkerrecht*, p. 103.

<sup>4</sup> *Brit. and Col. Prize Cases*, Vol. I, p. 60.

claims of any description against the allied and associated powers and their nationals in respect of the detention, employment, loss, or damage of any German ships or boats." She was further required to recognize the right of the allied and associated powers to the replacement, ton for ton and class for class, of all merchant ships and fishing boats lost or damaged during the war and to cede to the allied and associated powers all German merchant vessels of 1,600 tons gross and upwards.<sup>1</sup> The treaty with Austria contained similar provisions.<sup>2</sup> This decision was based, in part, on the principle of reparation, the larger number of the allied ships having been destroyed by methods which were regarded as illegal, and in part it was a punitive measure for the drowning of non-combatant crews and passengers on merchant vessels.

The policy of the belligerents in respect to trade and intercourse with the enemy, like other measures adopted by them to weaken the economic power of their adversaries, were rigorous and in some respects went beyond the customary practice of the past. Not only was trade of every sort absolutely prohibited without any of the customary relaxations but the British courts even interpreted the legislation and proclamations relating to trade with the enemy as prohibiting intercourse of every kind.<sup>3</sup> No distinction was made between trade and intercourse which would inure to the benefit of the enemy and that which would not—both alike were forbidden and rigorous measures were adopted to enforce the prohibitions. The entering into contracts with persons of enemy character was forbidden and partnerships in which some, or all the partners were domiciled in enemy country were dissolved even when the

<sup>1</sup> Treaty of Versailles, Part VIII, Annex III, Parts 1 and 8.

<sup>2</sup> Treaty of St. Germain, Part VIII, Annex III.

<sup>3</sup> See the case of *Premier Oil and Pipe Line Company*, 31 L. T. R. 420 (1919), and the *Panariellos*, *ibid*, p. 326. It was not even permissible in the United States, Great Britain and France to procure from Germany a scientific periodical.

partners were all nationals of the country whose courts pronounced the dissolution.<sup>1</sup> Some French courts even went to the length of holding that the action of a French *avocat* who agreed to defend the case of a German before the courts was a forbidden contract, but the court of Paris ruled otherwise. Contracts with enemy aliens entered into before the war were dissolved whenever performance would involve trading or intercourse with the enemy parties.<sup>2</sup> In determining the question of who was an enemy in the sense of the prohibition relative to trade and intercourse, the United States and Great Britain, following their traditional practice, adopted the test of domicile.<sup>3</sup> Every person domiciled in enemy territory, even if of American or British nationality, was regarded as an enemy with whom it was unlawful to trade or communicate. But persons of enemy nationality residing or domiciled in neutral territory had never been considered as enemies for purposes of trade and they were not so regarded during the early part of the World War. France, on the other hand, followed her traditional rule which makes nationality the test. Persons of enemy nationality, wherever residing, whether in the enemy country or in neutral territory, were regarded as enemies and it was unlawful to trade with them. The French Government, however, departed from her traditional practice in one respect. By a decree

<sup>1</sup> See the British case of *Rex v. Kupfer*, 2 K. B. 321 (1916), where a partnership between three British subjects, two of whom were domiciled in Germany, was dissolved.

<sup>2</sup> The whole matter of the effect of war on contracts is discussed in my *International Law and the World War*, Vol. I, Ch. IX, where numerous cases and opinions are cited. As to French policy, see also the article of Audinet, 27 *Rev. Gén.*, p. 299. The provision of the treaties of peace relative to the effect of the war on contracts are discussed below in Lecture IX.

<sup>3</sup> As to the Anglo-American rule of domicile, see Huberich, *Trading with the Enemy*, pp. 30 ff.; Cobbett's *Leading Cases*, Vol. II, pp. 74 ff.; Trotter, *Effect of War on Contracts*, pp. 21 ff.; an article entitled "Intercourse with Alien Enemies," in the *Law Quarterly Review*, Jan., 1915, pp. 30 ff.; and the case of *Porter v. Freudenberg*, 1 K. B. 857 (1915).

of September 27, 1914, and a law of April 4, 1915, Frenchmen were forbidden to trade not only with the subjects of Germany and Austria-Hungary, but with all persons residing in those countries whatever their nationality. Thus the Anglo-American principle of domicile or residence was adopted so far as it concerned trade with the enemy country. French legislation even prohibited trade with enemy subjects residing in France and this rigorous principle was sanctioned by the economic conference of the allies in 1916, which pledged the allied powers to prohibit their nationals and every person residing in their territories from trading with the inhabitants of enemy states, whatever their nationality, and with enemy subjects, wherever resident.<sup>1</sup>

The application by the British government of the rule of domicile which allowed British subjects to trade with enemy houses and persons in neutral countries (outside Europe) conflicted with the French rule of nationality which forbade Frenchmen from trading with such houses or persons. As the two countries were allies, their differences of policy caused some embarrassment and even criticism in France, and in order to bring the conflicting policies into harmony, the British parliament passed an act in December, 1915, authorizing the government to forbid trade with houses or persons of "enemy nationality or enemy association," in neutral territory. Thus the traditional test of domicile was to be replaced by the continental test of nationality. In accordance with the authority thus granted, the British government caused to be prepared lists (the so-called "black lists") of all such houses and persons in neutral countries and British subjects were forbidden to trade with them.<sup>2</sup> The publication of these lists caused

<sup>1</sup> Compare Audinet, 27 *Rev. Gén.* (1920), p. 294, and Schweitzer, *L'Interdiction du Commerce avec L'Ennemi*.

<sup>2</sup> The French government had already in August issued an extensive "black list" of enemy firms in neutral countries, with whom Frenchmen were forbidden to trade. See Clunet's article in Clunet (1916), pp. 1507 ff.

The Italian government followed the example of Great Britain and France, in this respect.

some emotion in neutral countries and the American government, in particular, addressed a remonstrance to the British government, mainly on the ground that the preparation of the lists had been arbitrarily made, but also because it was an "extraordinary" measure, inconsistent with that "true justice, sincere amity and impartial fairness which should characterize the dealings of friendly governments with one another," and one in which the American government could not acquiesce. To this protest, Sir Edward Grey replied that the act of parliament in question was a "piece of purely municipal legislation" intended to prohibit persons in the United Kingdom from trading with persons of enemy nationality or association in neutral countries and as such was clearly within the right of every sovereign state. Adverting to the old test of domicile which the United States and Great Britain had always applied in determining enemy character for purposes of trade, he declared that it was inadequate under existing conditions, when the activities of enemy subjects were ubiquitous and public opinion in England would no longer tolerate trading with enemy houses in neutral countries when the effect would be to add to their wealth and influence which would be placed at the service of the enemy.<sup>1</sup> Whatever may have been the merits of the American contention, it is significant that when the United States became a belligerent it promptly adopted the Anglo-French policy and in December, 1917, issued a "black list" containing the names of some 1,600 persons and houses in neutral countries with whom all persons and houses in the United States were forbidden to trade.<sup>2</sup> This action affords

<sup>1</sup> The correspondence between the American and British governments relative to the matter may be found in the white book, issued by the Department of State of the United States, entitled *Dipl. Cor. with Bellig. Countries\* Relative to Neutral Rights and Duties, European War*, No. 3, pp. 54 ff. Details concerning the controversy in my *International Law and the World War*, Vol. I, pp. 228 ff. See also Clunet, 1916, pp. 1507 ff. and Audinet, 27 *Rev. Gén.*, pp. 297-228.

<sup>2</sup> The original list of 1,600 names was published in the *Official Bulletin* of Dec. 5, 1917. In May, 1918, a new and enlarged list of 5,000 persons and firms was issued, *Off. Bul.*, May 4, 1918.



a striking illustration of the well known fact that the point of view of a government is often one thing when it is a neutral, and a very different thing when it is a belligerent; in short, it is likely to be determined rather by its own immediate interests than by strictly legal conceptions or traditions.

Difficult and delicate questions were raised in most belligerent countries regarding the status of companies incorporated under their laws and having a situs in their territories, but the shareholders or directors of which were composed wholly or in part of enemy subjects. British legislation clearly intended to treat as enemy companies those registered in England and directed or managed by enemy persons but there was doubt, as to the status of mixed companies, that is, those composed in part of British shareholders and in part of enemy shareholders. Was the corporation an entity separate and distinct from the shareholders who composed it, so that the former might be regarded as British even though the latter were enemy persons? In *Solomon's* case, decided in 1897, it was so held and this view was followed by the British Court of Appeal in a famous case during the World War, where it was held that a company registered in England was an English company notwithstanding that all the 2,500 shares of stock, except one, were owned by Germans.<sup>1</sup> The decision, however, provoked wide-spread criticism in England and it was overruled by the House of Lords which rejected the separate entity theory and laid down the rule that it is permissible to go behind the corporation and ascertain its nationality from that of its shareholders and directors.<sup>2</sup>

<sup>1</sup> *Continental Tyre and Rubber Co. v. Daimler and Co.* 1 K. B. 883 (1915).

<sup>2</sup> A. C. 507 (1916). There is an extensive literature dealing with the question raised in this case. See especially Huberich, *op. cit.*, pp. 72 ff.; Hogg, in the *Law Qu. Review*, 33: 76 ff.; Schuster in II *Grotius Soc. Pubs.*, pp. 57 ff.; *London Law Times* of May 22, and Oct. 24, 1915 and July 8, and Nov. 11, 1916; Baty in *Int. Law Notes*, Sept., 1917. See also list of references in 27 *Yale Law Jour.*, 109.

The doctrine of the House of Lords, however, was not followed by the American courts, which maintained the old principle that a corporation is an entity separate and apart from the incorporators.<sup>1</sup> In France, as in England and the United States, the preponderance of authority and judicial precedent had always been in favor of the principle that the nationality of a corporation was that of its *siège social*, without regard to the nationality of its directors or shareholders.<sup>2</sup> But during the World War there were many companies in France which according to this rule were technically French companies but which were, in fact, enemy companies because their directors or shareholders, or both, were enemy subjects. The French government at the outset took the position that in such cases the corporation was merely a mask which concealed the identity and character of the real company. To determine the true nationality of such a company, it was necessary to pull off the mask and go behind the corporate entity and ascertain whether under its cover there was concealed an enemy company. Instructions were therefore issued to the judicial authorities to act in accordance with this view and treat as an enemy concern every company incorporated in France but which was in fact, a *personne interposée* under the cover of which there was an enemy. The Court of Cassation, like the English House of Lords, held that it had the right "to go to the bottom of things and ascertain whether a company was in reality French or such only in appearance."<sup>3</sup> So far as trading with the enemy is concerned, it would seem that this is a logical view since the corporation apart from its members is a purely artificial thing without

<sup>1</sup> See the decision of the New York Supreme Court in the case of *Fritz-Schultz Co. v. Raimés Co.*, 100 Misc. 697 (1917).

<sup>2</sup> The more important authorities are cited in my *International Law and the World War*, Vol. I, p. 224, n. 2.

<sup>3</sup> *Société Conserve Lenzburg*, Clunet, 1915, pp. 1164 ff. French policy is discussed in more detail in my work cited, I, 224-225, where various cases are cited. See also Audinet, 27 *Rev. Gén.*, 296.

motives, intentions or passions and as such it can be neither friend nor enemy, neither loyal nor disloyal.

As stated in the early part of this lecture, employment of various new instrumentalities and materials of destruction during the World War gave rise to much controversy regarding the means that a belligerent may lawfully employ for injuring his enemy. Article 22 of the Hague Convention respecting the laws and customs of war on land affirms that these means "are not unlimited"; the same Convention forbids the use of certain specifically enumerated weapons; among others, "arms, projectiles and material calculated to cause unnecessary suffering." Special declarations of the Hague forbid the employment of expanding bullets and the use of projectiles, the sole object of which is the diffusion of asphyxiating or deleterious gases. In addition to these more specific prohibitions the Declaration of St. Petersburg lays down certain well-known general principles regarding the legitimate object of war which it declares to be merely the weakening of the military forces of the enemy—an object we are told which would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable. Besides these conventional prohibitions and enunciations of general principles, there are well-established customs and usages of civilized warfare which impose restrictions upon belligerents in respect to the means of destruction which they may employ.<sup>1</sup> There is a general agreement that these means are not unlimited and this view, as stated above, is formally enunciated by the Hague Convention. But the general statement relative to the object of war as defined by the Declaration of St. Petersburg is not universally accepted. Moreover, there is no agreement as to what particular weapons or materials may be used without contravening the general rule forbidding the employment of

<sup>1</sup> As to the means which a belligerent may lawfully employ to overcome his enemy, see especially Pillet, *Les Lois Actuelles de la Guerre*, Chs. IV-V, and Spaight, *War Rights on Land*, Ch. IV.

those which cause superfluous suffering. The older German military writers and commanders, like von Clausewitz, von Hartman and von Moltke, as well as many German commanders during the World War, adopted a view of the nature and objects of war and the means which are permissible to prosecute it which has been the subject of much criticism. In general, they maintained that the object of war is not merely the weakening of the military forces of the enemy as the Declaration of St. Petersburg affirmed, but that it includes the destruction of the economic and even the intellectual power of the enemy; that the shorter the duration of the war, the more humane it is; and that to these ends it is permissible to employ virtually all means at the command of the belligerent. War, they maintain, can hardly be conducted in a civilized manner and the test of the legitimacy of a weapon is not so much whether it is humane as whether it is effective and whether its use will conduce to the attainment of the object of the war and especially the shortening of its duration. "Every means," said the Imperial Chancellor in his address to the *Reichstag* in March, 1916, "calculated to shorten the war constitutes the most humane policy to follow. When the most ruthless methods are considered best calculated to lead us to victory and a swift victory, they must be employed."<sup>1</sup> This view of belligerent right and of military necessity is that which was enunciated in the Manual of the German general staff—the *Kriegsbrauch im Land Kriege*. In general, the German military and naval commanders acted in accordance with this view throughout the World War. They did not, of course, admit that there were no limitations at all on the right of belligerents in respect to the agencies, instrumentalities and methods which they may employ, and, in fact, their government protested against the alleged use by the enemy of dum dum

<sup>1</sup> The opinions of various German military writers and commanders are quoted in my *International Law and the World War*, Vol. I, pp. 278-281.

bullets, against the dropping of bombs by enemy aircraft upon German towns, against the employment of African troops on European battle fields and even against the alleged use of short guns by the American troops, and it usually denied or attempted to justify the charges made against its own forces for having disregarded the restrictions and prohibitions of the international conventions and established usages.

Against the extreme view of the German militarists as explained above, there is the more general, and, one may say, the more enlightened body of opinion which regards war, in the main at least, as a contest between armed forces, that the test of the legitimacy of the means that may be employed in carrying it on is not necessarily their effectiveness as agencies of destruction, that belligerents are definitely limited by considerations of humanity and the duty to respect as far as possible the rights of the non-combatant population, etc. This is the view enunciated in the international conventions, in the treatises of most writers on international law, some of whom, like Bluntschli and von Bar, were German, and in the war manuals issued by particular states.<sup>1</sup> Manifestly, it is not possible within the limits of this lecture to consider the various charges and counter-charges made by each belligerent during the World War, against the other for having employed instrumentalities and methods which are forbidden either by the international conventions or by the established usages of civilized war. Such charges were numerous; some of them, as is the case in every war, were not well-founded; but the truth of others was well established. In this lecture I shall limit myself to a brief discussion of the controversies raised by the employment of *new* agencies and methods.

The first important question of the kind was raised by the employment of asphyxiating, if not poisonous, gases as a

<sup>1</sup> For example, the *American Rules*, Arts. 172-173; the *British Manual*, Art. 39, and the *French Manual*, Art. 56.

means of attack against the infantry forces of the enemy. The use of gas for this purpose appears to have been first employed by the Germans against the British forces in the battle of Ypres in April, 1915.<sup>1</sup> It is true that the Germans subsequently claimed that this method of attack had already been employed by the allies,<sup>2</sup> but the charge was denounced by Sir John French as an "astounding falsehood."<sup>3</sup> Lord Kitchener in the House of Lords on May 18, 1915, denounced the act of the Germans as one which would "stain indelibly her military history and which would vie with the barbarous savagery of the Dervishes of the Sudan."<sup>4</sup> Lord Armstrong characterized this method of warfare as "probably the most devilish ever invented by human ingenuity"; the *London Times* stigmatized it as "atrocious," and Sir John French in his report denounced it as a "diabolical contrivance" forbidden by the Hague Convention. This was also the opinion generally expressed by the press in neutral countries.

The Germans defended their conduct on the ground that the use of gas was no more inhumane than other recognized means of attack, such as bombardment of trenches; they denied that the gas used by them inflicted "superfluous" injury upon enemy soldiers who inhaled it; and finally, they justified it as a legitimate measure of reprisal against the enemy whom they charged with already having resorted to this mode of attack. The first German "gas attack" having proved successful,

<sup>1</sup> See the Report of Sir John French on the methods employed and the effects, *London Times History of the War*, Vol. V, p. 53; see also Williams, *With Our Army in Flanders*, pp. 49 and 59 ff.; Washburn, *The Russian Campaign*, pp. 158 and 169 ff.; Bland, *Germany's Violations of the Laws of War*, p. 29, and a brochure by Clunet, entitled *La Guerre par l'Asphyxie, l'Empoisonnement et la Combustion de l'Adversaire*, Paris, 1915.

<sup>2</sup> See the German reply to the appeal of the International Red Cross Committee, 46 Clunet, 860.

<sup>3</sup> In 1918, the Prussian Minister of War, General von Stein, admitted that the Germans had been the first to use gas as a means of attack.

<sup>4</sup> *Times History of the War*, Vol. V, p. 70.

others followed and the allied armies considering it necessary to defend themselves against such methods soon organized gas services and thereafter gas warfare became a regular feature of the operations on both sides. The International Committee of the Red Cross Society promptly addressed a protest to the belligerent governments against the use of asphyxiating and poisonous gases, as a cruel and barbarous method of warfare, and appealed to them to refrain in the future from such methods.<sup>1</sup> The governments of the allied powers replied that they fully shared the views of the committee regarding the horror and inhumanity of such methods of warfare and asserted that at the outset they had abstained from employing gas for such purposes, and that they had been driven to its use as a means of protection, but that if Germany would undertake to discontinue its employment and would offer guarantees for the observance of the engagement, they would be prepared to examine the proposal in the most liberal spirit.<sup>2</sup> The German government replied that in the beginning the high command had refrained from resorting to cruel methods of warfare, but that the barbarous conduct of the enemy, who had publicly proclaimed that Germany must be destroyed, had driven the high command to adopt counter-measures and that, in consequence, Germany could not renounce this means of combat. Furthermore, it was justifiable as a measure of reprisal because, it was alleged, the enemy had in fact made use of asphyxiating gas as a means of attack at least a month before the Germans had employed it.<sup>3</sup> Whether the employment of gas as a means of attack was in contravention of the Hague Conventions and declarations, it may be noted that what they prohibit, in the first place, is the use of "projectiles" which diffuse gases and not the generation of gaseous fumes which reach the enemy by

<sup>1</sup> Text in 45 Clunet, pp. 774-776.

<sup>2</sup> Text of the allied reply in 45 Clunet, pp. 1005-1007.

<sup>3</sup> Text of the German reply, 46 *ibid*, pp. 860 ff.

being blown by the wind. The Germans therefore argued that such a mode of attack was not forbidden. Whatever the merits of this argument, it ceased to have any weight<sup>1</sup> as soon as the Germans adopted the practice of throwing explosive bombs charged with gas into the trenches, because in such cases it was impossible for the soldiers to avoid the fumes as they could when it was left to the wind to waft them against the enemy. Moreover, Article 23 of the Hague Convention prohibits the employment not only of *projectiles*, but also of *material* of a nature to cause superfluous injury. On the basis of this provision the test of the legitimacy of gas warfare must be its effect upon the victims, and the effect in turn depends upon the nature of the gas employed, that is, whether it is merely asphyxiating or whether it is poisonous. Sir John French in his report on the battle of Ypres, Lord Kitchener in the House of Lords and the reply of the allies to the appeal of the International Committee of the Red Cross Society, all asserted that the gases employed by the Germans were "poisonous." Whatever may be the facts as to this, the testimony of physiological experts, hospital surgeons and all who saw the victims, were in agreement that the effects of the gas were congestion, spitting of blood, and the like, causing intense and prolonged suffering and in severe cases ultimately an agonizing death. If the employment of such "material" does not cause "superfluous injury," or "uselessly aggravate the sufferings" of its victims, it is hard to see what the St. Petersburg and Hague Declarations could have had in mind. The only conclusion possible, therefore, is that the belligerent which first resorted to the use of gas as an instrumentality of attack violated the plain intent of the Hague Convention and the enemy was thereupon justified in retaliating, although it should be remarked that there was some difference of opinion,

<sup>1</sup> Fauchille, in 22 *Rev. Gén.* 409, ridicules the distinction which the Germans sought to make between "projectiles" and other means of diffusing gaseous fumes.



specially in England, as to the expediency of resorting to the policy of reprisal.<sup>1</sup> Nevertheless, as stated above, this method of warfare was employed on an extensive scale by most of the belligerents during the World War and chemical warfare services were established by their governments to study and perfect the methods and instrumentalities by which its effectiveness could be increased. Great progress in this respect was achieved and it is already predicted by chemical experts that unless restrictions are imposed on its use, the next war will be largely a "chemists' war."<sup>2</sup> There is naturally still a difference of opinion regarding the legitimacy of the employment of toxic gases and liquids as a means of attack against men; those who regard effectiveness as the test of the lawfulness of an instrument or method will be reluctant to renounce a means, the effectiveness of which was abundantly demonstrated during the late war. On the other hand, those who believe that war should be conducted as humanely as possible, and that those whose unhappy lot will expose them to the frightful destructiveness which is likely to characterize future wars, should be spared from unnecessary suffering, desire to see restrictions imposed in the use of such instruments and agencies.

At the Washington disarmament conference of 1922 the question of placing restrictions upon the employment of submarines for the destruction of merchant vessels and upon the

<sup>1</sup> The Archbishop of Canterbury and the Bishop of London opposed it and the former appealed to the government not to employ asphyxiating gas against the enemy.

<sup>2</sup> Dr. E. E. Glasson, an American chemist, says: "A single airplane with a couple of men may sail over a warship at an unassailable height and besprinkle its decks with a liquid so corrosive that three drops of it touching a man's skin at any part will kill him, and so persistent that such little of it as may be caught in the crevices will render the ship uninhabitable for days." Exhibit prepared by the Chemical Warfare Service of the United States, 1921.

Brigadier General A. B. Fries, Chief of the Chemical Warfare Service of the United States army, recently stated that "the use of poisonous gas at the end of the World War was a child's game compared to what it will be in the future." See his annual report for the fiscal year ending June 30, 1920.

use of gases in land warfare was brought up for consideration, and ultimately a treaty was signed by the plenipotentiaries of the United States, the British Empire, France, Italy and Japan, Article V of which is as follows :—

“The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a majority of the civilized Powers are parties, the signatory powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and to invite all other civilized nations to adhere thereto.”

The treaty was promptly ratified by the United States, so that at least one of the great powers has solemnly bound itself not to employ such materials or methods in the future, at least in wars with any of the other parties which may have ratified the agreement. It is to be hoped that the prohibition will be universally accepted and if accepted, observed by belligerents. It is probable that the preponderance of the public opinion of the civilized world condemns what has been pronounced to be “the most insidious and deadly method of aggression yet contrived by the ingenuity of man” but among those who condemn it is a large number who have little faith in the efficacy of conventional engagements by which states in time of peace promise to renounce it. But it may at least be said that a solemn undertaking to do so is preferable to no engagement at all.<sup>1</sup> It is not improbable also that the horror and cruelty of such a method of war in its more perfected form may serve to deter belligerents from resorting to it from fear of retaliation by the enemy, since chemical experts tell us that a new and powerful gas is almost certain to be discovered against which no

<sup>1</sup> Mr. Root in presenting the abovementioned treaty to the conference remarked: “Cynics have said that in the stress of war these rules will be violated. Cynics are always near-sighted and often and usually the decisive facts lie beyond the range of their vision.” 16 *Amer. Jour.*, p. 189.

mask will be an adequate protection.<sup>1</sup> As in the case of bomb dropping by air craft the events of the Great War demonstrated that it is impossible to confine "gas attacks" to the persons and objects against which they are intended to be directed, because the fumes may be driven by the wind from the battle zone to areas inhabited by the civilian population who thus become innocent victims.<sup>2</sup>

Other new instruments of destruction were employed, the legitimacy of which, or rather the methods by which they were used, was the subject of much controversy. Of these the airship and the submarine torpedo boat provoked the most discussion. As to use of the airship for dropping bombs upon cities, towns and villages, I have spoken in a previous lecture, where the view was expressed that the bombing of such places outside the actual area of military operations ought to be condemned because of the impossibility of confining the launching of bombs to the persons and things which are recognized as legitimate objects of attack. The opinion was also expressed that the distinction which the Hague Convention attempts to make between "defended" and "undefended" places has no practical basis, so far as bombardment from the

<sup>1</sup> *Chemical Warfare*, a U. S. army publication, states in a recent issue that there are three distinct types which may be used by aviators: mustard gas which is "extremely poisonous" and against which there is no effective means of protection, the phosgene type, of which even a single breath may cause death; and the lachrymator type, the best of which are either liquids or solids of high boiling point and low vapor pressure and therefore "relatively persistent." Speaking of the probable perfection in the destructive power of toxic gases and comparing the destructiveness of those first used by the Germans in April, 1915, Captain Auld, a British expert, pronounced it to be "the deadliest weapon so far invented by man," and he added: "from that date till the close of hostilities the developments in chemical warfare were so far-reaching, so fundamental, that to think of gas, as many still do, in terms of 1915, is as anachronistic as thinking of to-morrow's battles in terms of Washington's campaigns."

<sup>2</sup> Thus on the occasion of the bombardment of Armentières in August, 1917, the poisonous fumes from the shells penetrated the houses and cellars and the inhabitants who took refuge therein became the victims.

air is concerned.<sup>1</sup> If, therefore, the distinction which both the conventional and customary law of nations makes between the armed forces and the non-combatant population, is to be preserved, the employment of the airship as an instrument of attack should be restricted to the zone of military operations or to the bombing of military or other similar establishments outside the zone only when they can be attacked without endangering the lives of the civilian population or destroying houses and institutions which are protected by the law of nations against destruction.

Coming now to the submarine, which was employed for the first time on an extensive scale during the World War and which proved to be the most effective of the new weapons of destruction, it may be remarked that the two characteristics which differentiate it from ocean craft formerly employed in naval warfare are that it is capable of navigating for long distances below the surface and because of the smallness of its size it lacks facilities for the accommodation of the crews and passengers found on the ships which it sinks. As in the case of gas warfare, the submarine as an instrument of combat was first employed by the Germans, who greatly perfected it through scientific invention, and, when their surface navigating vessels had been driven from the seas, it became their only available naval arm. As such it proved remarkably effective and was employed on an extensive scale and with great success. The other maritime powers quickly introduced it and submarine warfare, like gas warfare, soon became a regular feature of the war. At the outset, the Germans employed the submarine not only for the destruction of the cruisers and battleships of the enemy but also for the destruction of the enemy's merchant vessels, and even of neutral vessels, hundreds of which were sunk, often without warning, and generally without removing

<sup>1</sup> See above, Lecture IV.

the crews and passengers and making provision for their safety.<sup>1</sup>

As to the right of a belligerent to sink the merchant vessels of the enemy, with certain exceptions, it was generally admitted by the authorities on international law; it was recognized by the prize regulations of most states; it had frequently been exercised in practice and had been upheld by the prize courts,<sup>2</sup> though it was a generally recognized principle of international law, affirmed by the prize regulations of many states, that prizes whenever possible ought to be taken into a prize court in order to have the lawfulness of their capture determined judicially. As to the destruction of *neutral* prizes there was less unanimity of opinion. English judicial authority and opinion was generally against it, but there was much authority in favor of the right of destruction in exceptional cases, though there had been few or no instances of its exercise prior to the Russo-Japanese War of 1904-05. But whatever the differences of opinion regarding the circumstances under which merchant vessels, whether of enemy or neutral nationality, might be sunk, opinion was practically universal, at least prior to the World War, that no merchant vessel could be lawfully destroyed without warning and

<sup>1</sup> Details of the destruction by German submarines of both enemy and neutral merchant vessels may be found in my *International Law and the World War*, Vol. I, Ch. 15, and Vol. II, Ch. 31. See also Perrinjaquet *La Guerre Commerciale Sous Marine*, 23 *Rev. Gén.*, pp. 117 ff. and 394 ff., and 24 *ibid.*, pp. 137 ff. and 365 ff.; Sir F. Smith, *the Destruction of Merchant Ships under International Law* (1917); Merignhac and Lémonon, *Le Droit des Gens et la Guerre de 1914-1918*, Vol. II, Ch. 3; Fauchille, *Droit Int. Pub. Guerre et Neutralité*, Secs. 1383 ff.; also his article *La Guerre Sous Marine*, in 25 *Rev. de Droit Pub.*, pp. 80 ff.; Villeneuve, *Le Blocus de l'Allemagne—La Guerre Sous Marine* (1917), and Hyde, *International Law* (1922), Vol. II, pp. 477 ff., where citations to the diplomatic correspondence dealing with the controversy may be found. The American White Books, *European War*, issued by the Department of State, contain much information regarding the details of German submarine methods together with the diplomatic correspondence between the United States and the belligerents relative to the matter.

<sup>2</sup> See the opinions cited and the review of the practice in my work cited, I, 362 ff.

without provision being made by the commander of the destroying vessel for the safety of the crew and passengers on board. The prize regulations of nearly all states including those of Germany,<sup>1</sup> the Hague Convention of 1907 respecting the status of enemy merchant vessels at the outbreak of war<sup>2</sup> and the Declaration of London<sup>3</sup> all laid down this rule. The practice in previous wars had also been without exception in accordance with this requirement.<sup>4</sup> But it was generally disregarded by the commanders of German submarines during the World War, hundreds of merchant vessels, both enemy and neutral, being sunk without warning or without sufficient warning to enable the crews and passengers to take to the life boats, and only in rare instances were they taken aboard the submarine. The result was the drowning of thousands of non-combatants, many of them being women and children; other large numbers were crowded into life boats and set adrift far from land sometimes in mid-winter and left to die of starvation, thirst, exposure to cold or to be washed overboard by rough seas.

Against this method of warfare the opinion of the civilized world, outside Germany, vigorously protested. The President of the United States in his note of May 13, 1915, relative to the sinking of the *Lusitania* called the attention of the German government to the "practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice and humanity which all modern opinion regards as imperative," and again on April 19, 1916, he declared it to be "incompatible with the principles of humanity, the long established and incontrovertible rights of neutrals and the sacred immunities of non-combatants."

<sup>1</sup> Article 116 of the German prize code of July 1, 1915.

<sup>2</sup> Article 3.

<sup>3</sup> Article 50.

<sup>4</sup> The practice in former wars is reviewed in my work cited above, I, 370 ff.

The Germans defended the employment of the submarine on various grounds. First, they argued, in effect, that since the submarine by reason of its build lacked accommodation for crews and passengers it should be relieved of the obligation to provide for their safety. In the second place, the rule requiring such a provision was not applicable to submarines. The rule originated when submarines were hardly dreamed of and when battleships and cruisers were the only naval craft for destroying prizes. Since they had accommodation for crews and passengers, they could justly be required to observe the old rule, but if it were binding on the commanders of submarines, the effect would be to render impossible the use of the only naval arm which Germany had left. In short, a belligerent in using a new weapon is not obliged to conform to rules which were intended to regulate the use of different weapons. The old rule was still applicable to cruisers and battleships and German commanders thereof had uniformly conformed to the rule by making provision for the safety of crews and passengers, but it was not applicable to submarine warfare. Moreover, it was often impossible for submarine commanders to give sufficient warning to enable the crew and passengers to take to the life boats because of the danger to which the destroying submarine would be exposed from the approach or presence of enemy warships or from destruction by a gun carried by the ship itself, since Germany's enemies and in some cases neutral powers had adopted the policy of arming their merchantmen and of instructing them to offer resistance. Their prizes could not be taken into a home port, first, because the submarine could not spare a prize crew, and, second because German ports were effectively blockaded. Neutral ports were also closed to them. Under these circumstances the only alternative was to destroy their prizes or allow them to go free. Finally, the Germans justified their method of submarine warfare on the ground of "military necessity" and as a legitimate measure of reprisal against the enemy for

various acts, particularly the British blockade, which they regarded as illegal.<sup>1</sup>

The first of these arguments amounted, in effect, to a claim of special immunity for the submarine from an obligation to conform to the rule which the German government admitted to be binding upon the commanders of cruisers and other surface navigating war vessels, this because it could not comply with the rule, owing to its smallness of size and fragility of construction. It was tantamount to arguing that when a weapon cannot be employed in accordance with an established rule founded on considerations of humanity and respect for the rights of non-combatants, the belligerent may disregard the rule if any strategical interest would be subserved by its employment. It is submitted, however, that to argue that a cruiser cannot sink merchant vessels without conforming to the rules established in the interests of humanity but that a submarine may, if it cannot observe the rules, is grossly illogical. The argument that the rule in respect to providing for the safety of the crews and passengers on vessels destroyed was inapplicable to submarines because there were none in existence at the time the rule was formulated was based on the inadmissible assumption that general prohibitions and restrictions founded upon humanitarian considerations apply only to the instrumentalities and agencies of destruction in use at the

<sup>1</sup> The Imperial Chancellor, Bethmann-Hollweg, in an interview given to the Associated Press on Jan. 25, 1916, justified Germany's submarine warfare as a measure of reprisal. Chancellor Michaelis, in an address before the Reichstag, July 19, 1917, maintained that it was in entire accord with the rules of international law. The principal arguments in defense of submarine warfare may be found in a series of articles by a number of distinguished jurists including Fleischmann, Rehm, Heilborn, Triepel and others, in the *Zeitschrift für Völkerrecht*, Bd. IX (1915). See also an article by Professor Zitelmann entitled *Das Krieg und Völkerrecht* in a volume entitled *Deutschland und der Weltkrieg* (1915). See also Steinuth, *England und der U-Boot Krieg* (1915). The German methods of submarine warfare were also defended by an American jurist, Professor John W. Burgess. See his *America's Relations to the War* (1916), p. 16.



time they were formulated. It is submitted that such rules are eternal and unaffected by new inventions, otherwise the obligations of humanity in the conduct of war would vary from time to time with the invention of new weapons or agencies of destruction, or might cease altogether with the entire disappearance of those in use at a particular time.<sup>1</sup> The contention of Professor Zitelmann and other German jurists that if the submarine had been foreseen at the time the rules governing cruiser warfare were formulated, submarines would have been specially exempted from an obligation to observe them, has no basis in fact, for it would have been a singular conception of humanitarian duty which would have required the commanders of one type of vessel to spare non-combatants on the ships which they destroy but have relieved the commanders of another type from the same obligation. The fact is, those who defended the German policy confused the right of a belligerent to destroy the enemy's merchant vessels—a right which was not contested—and his right to destroy the lives of the unoffending non-combatants which they carried—a right which never had been admitted.<sup>2</sup> Finally, the argument, based on the right of reprisal was not a sufficient justification. No German merchant vessels with their crews and passengers had been destroyed by the naval forces of the enemy. Admitting that the blockade of Germany was illegal, as the German government contended, it constituted no justification for measures of

<sup>1</sup> Compare an article by Professor A. P. Higgins entitled "Submarine Warfare" in the *British Year Book of International Law* (1920-21) especially pp. 159-60. Professor Higgins points out that the invention of new weapons cannot alter universally accepted rules based on principles of humanity—at least it does not authorise a particular belligerent to change them to meet his own immediate needs. He adds very correctly: "New weapons are illegitimate if their use necessarily entails violation of fundamental principles."

<sup>2</sup> Compare Fauchille, 25 *Rev. Gén.*, p. 75, who justly remarks that the right of a belligerent to destroy prizes embraces only the right to destroy ships and cargoes and not the lives of the persons on board, when the prizes are merchant vessels.

reprisal against non-combatants and especially against neutral persons travelling on enemy merchant vessels.

It is hard to avoid the conclusion that the submarine, at least in its present state of perfection, is not an instrumentality which can be legitimately employed for the destruction of merchant vessels, unless the world is prepared to sacrifice what President Wilson called "the sacred immunities of non-combatants." As Sir Edward Grey well said in his note of March 1, 1915, to the American government, speaking of the duty of captors to provide for the safety of the crews and passengers before destroying their prizes: "A German submarine, however, fulfils none of these obligations; she enjoys no local command of the waters in which she operates; she does not take her captures within the jurisdiction of a prize court; she carries no prize crew which she can put on board a prize; she uses no effective means of discriminating between a neutral and an enemy vessel; she does not receive on board for safety the crew and passengers of the vessel she sinks; her methods of warfare are therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war."

It is submitted, therefore, that if submarines are to be retained as vessels of combat their use should be confined mainly to the destruction of war vessels and their employment for the destruction of merchant vessels proscribed, at least until it has been demonstrated that they can be employed for the latter purpose without violating the rights of neutrals and non-combatant enemy persons.<sup>1</sup> If, however, the general practice

<sup>1</sup> Compare in this connection the opinion of Minor in *Procs. Amer. Soc. of Int. Law*, 1916, pp. 55, 59; C. P. Anderson, *ibid*, 1917, p. 15; Hyde, *International Law*, Vol. II, Sec. 748; and the recommendations of the Grotius Society of England, Transactions of the Grotius Society, Vol. IV, p. xlix. But see a remarkable address of Rear-Admiral S. S. Hall of the British navy in Vol. V of the Grotius Society Transactions (1914), pp. 82 ff., where he predicts that in the wars of the future the whole people will probably be regarded as combatants and the

of arming merchantmen for purposes of offensive warfare should be followed in the future, the situation would be altered, for in that case such vessels might properly be assimilated to the status of warships, in which case they would be legitimate objects of attack equally with cruisers and battleships and without any obligation on the part of the submarine commander to give warning or to provide for the safety of the persons on board.<sup>1</sup>

At the Washington disarmament conference of 1922 the British delegation submitted a proposal forbidding the maintenance, construction or employment in the future of submarines and it placed on the records its opinion that "their use which is of small value for defensive purposes, leads inevitably to acts which are inconsistent with the laws of war and the dictates of humanity." The proposal, however, was opposed by the delegations of the other powers, mainly on the ground that the submarine is an effective arm of states having small navies; that its employment against the warships of the enemy is as legitimate as the use of surface-going cruisers and other warships and that, subject to certain

"sea-going population" will come to take their share; nevertheless he condemns the use of torpedoes without warning whether discharged by submarines or surface vessels. In both cases it is the torpedo which is the trouble. He proposes, therefore, the proscription of the use of the torpedo by both surface and submarine craft, otherwise the destruction of innocent vessels cannot be prevented.

<sup>1</sup> The Grotius Society at its meeting in 1917 adopted a series of recommendations affirming the right of submarines to visit, search and seize both enemy and neutral merchantmen subject to the same rules as apply to other war vessels but forbidding absolutely the destruction of neutral merchantmen, except for resistance to search, blockade running and gross unneutral service; and forbidding also the destruction of enemy merchantmen except for reasons of military or naval necessity, such as danger to the submarine's own safety or to its operations. But in any case adequate provision must be made for the safety of the crews and passengers. They added that what constitutes "adequate provision" must depend upon the circumstances of each particular case. The placing of the crew and passengers in life boats within the sight of land and in a calm sea might be regarded as adequate provision, otherwise not. *Transactions*, Vol. IV, p. xlix.

restrictions, it may be legitimately employed against merchant vessels.<sup>1</sup>

The American delegation while taking this view of the matter, admitted that "unlimited submarine warfare should be outlawed"; that "laws should be drawn up prescribing the methods of procedure of submarines against merchant vessels, both neutral and belligerent," and that these rules "should accord with the rules observed by surface craft." It added: "If the submarine is required to operate under the same rule as combatant surface vessels, no objection can be raised as to its use against merchant vessels."<sup>2</sup>

While the conference declined to agree either to forbid the construction of submarines or to limit the amount of

<sup>1</sup> The opposition of the French delegation to the proposed abolition of submarines was particularly strong. The French point of view was thus stated by M. Stephen Lauzanne, editor of the *Matin*: "Nobody can say what a naval war in ten or twenty years will be, but anybody can say that it will be entirely different from naval wars in the past. Tons of explosives with airplanes as guides and steel will be poured on capital ships from a distance which may reach twenty or thirty miles. Hundreds and perhaps thousands of airplanes will attack the big super-dreadnoughts. Their fate will be sealed beforehand. Their only way of escaping destruction will be to disappear under the water. All the ships, large or small, in the future naval war will have to be submarines or not to be.

Therefore, why should we engage the future, why should we limit the progress of science, especially when we know that the ships of the new type which will be built in ten or fifteen years will cost three or four times less than the actual capital ships because they will necessarily be of smaller size?

In any case, France will never consent to the suppression of submarines, big or small; she will never give her signature to an agreement which would be only childish and inefficient. The submarine war is not more cruel than any other warfare. The submarine is not only, as Arthur Balfour admitted himself, "the arm of the weak," but it is also the arm of the poor. In these times of expensive living, it is the only arm which is still cheap." *New York Times*, November 19, 1921. To the same effect see the addresses of Admirals Sims and Wemyss both of whom condemn the illegal use of the submarine by the Germans during the world war but who do not regard that as a reason for outlawing it. *N. Y. Times Current Hist. Magazine*, May 1922, pp. 185 ff.

<sup>2</sup> Text of the report in 16 *Amer. Jour.* (1922), p. 186.

tonnage or the size of those which might be constructed in the future, it formulated and approved a treaty laying down certain conditions and restrictions governing the conduct of submarine warfare. The treaty provides, among other things, that a merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized and must not be destroyed unless the crew and passengers have been first "placed in safety"; that belligerent submarines "are not in any circumstances exempt from the universal rules above stated"; and that if a submarine cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and seizure. The signatory powers agreed to recognize these rules as "an established part of international law" and to invite all other civilized powers to give their assent thereto, so that "there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future conduct of belligerents." They further agreed that any person who should violate any of these rules, whether or not he is under orders of a governmental superior, should be deemed to have violated the laws of war and should be liable to trial and punishment "as if for an act of piracy" and might be brought to trial before the military or civil authorities of any power within the jurisdiction of which he be found.<sup>1</sup> On the face of it, the treaty allows the employment of submarines for the destruction of merchant vessels provided the commanders place the crew and passengers "in safety" and otherwise observe the rules which apply to surface navigating war vessels. But manifestly submarines in their present state of development cannot do this, at least in so far as it requires provision for the accommodation of crews and passengers on their own decks. Article IV of the treaty admits this, for "the signatory powers

<sup>1</sup> As to the scope and meaning of this declaration, see an editorial by Mr. Chandler P. Anderson in 16 *Amer. Jour.*, p. 260.

recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and non-combatants." Recognizing this fact and desiring to see the prohibition of the use of submarines as commerce destroyers universally accepted as a part of the law of nations, they agree to accept that prohibition as henceforth binding as between themselves, and to invite other nations to adhere thereto.

Mr. Root in presenting the treaty to the conference, remarked that it undertook "to state the most important and effective provisions of the law of nations in regard to the treatment of merchant vessels by belligerent warships and to declare that submarines are, under no circumstances, exempt from these humane rules for the protection of the life of innocent non-combatants"; that it undertook "to stigmatize as an act of piracy violation of these rules and the doing to death of women and children and non-combatants by the wanton destruction of merchant vessels upon which they are passengers"; and that it undertook "to prevent temptation to the violation of these rules by submarines, by prohibiting their use altogether as commerce destroyers." Adverting to the objection of "cynics" that such prohibitions would not be respected during the stress of war, he remarked that behind diplomatists and governments there rested the "public opinion of the civilized world" and which might, he thought, be relied upon to deter governments from deliberately violating solemn engagements assumed by them.<sup>1</sup> The treaty was signed by the plenipotentiaries of Great Britain, the United States, France, Italy, and Japan on the 26th of February, 1922, and it was shortly thereafter ratified by the treaty making authority of the United States. If ratified by the other signatory powers the result will be to outlaw the

<sup>1</sup> Text of his remarks in 16 *Amer. Jour.* (1922), pp. 188-189.

submarine as an instrumentality for the destruction of merchant vessels, as between the five powers so ratifying it. In the future, therefore, it may be employed only against warships and other legitimate objects of attack. It is believed that this "heroic" solution of the problem is the only one that will fully meet the situation and that it is absolutely necessary unless the world is prepared to abandon its long established conception of the rights of non-combatants and a universally recognized obligation in respect to humanity.<sup>1</sup>

Another important controversy to which the World War gave rise and one which was closely connected with that concerning the employment of submarines as commerce destroyers related to the status of merchant vessels, both belligerent and neutral, which had been armed by, or with the approval of their governments, for the purpose of enabling them to defend themselves against attack by German submarines. The principal question involved was whether a merchantman so armed retained its full status as a ship of commerce, and, in consequence, was liable to destruction only in accordance with the established rules governing the destruction of such vessels, or whether, by arming, it forfeited its immunities as a vessel of commerce and

<sup>1</sup> The *New York Times* probably expressed the humanitarian sentiment of America when it declared in a recent editorial that "if the submarine was blacklisted to-morrow, it would not have a defender left. Everybody would anathematize it because of the use the Germans made of it during the war. The long list of the ships they sank in wanton disregard of the humane interdictions of international law—helpless merchantmen, liners carrying innocent women and children and even hospital ships, marked, lighted and flagged for immunity from attack even by the Germans—should be read at the conference when the submarine is discussed, followed by Mr. Balfour's prediction, made before the Chamber of Commerce in this city after the war, that if there were another conflict between nations 'the least scrupulous of the belligerents' would behave as Germany did, 'and the commerce of the whole civilized world would be disorganized and destroyed.'"

"No case can be made out for the use of the submarine against merchantmen and it would always be employed to raid the enemy's trading ships—without violation of the humanities imposed by international law, no matter how excellent are the intentions of the nation that commissions them. The world wants the submarine abolished."

was therefore liable to destruction without warning and without provision being made by the captor for the safety of the persons on board. The question thus raised was one which neutral governments were also obliged to decide for themselves, for if the arming of such vessels did not alter their status they were entitled to be admitted to neutral ports as other merchant vessels; otherwise their entrance into and sojourn in neutral ports were subject to certain well-established restrictions governing the conduct of warships in such ports.

The practice of arming merchant vessels was a very old and general one; it was authorised by many naval and merchant marine codes; the practice had been sustained by the prize courts at least of England and the United States as one which did not alter the legal status of the vessels so armed, and, until the year 1913, no jurist or writer of importance had ever contested the legal right or expediency thereof. In that year, Professor Triepel of Berlin, at a meeting of the Institute of International Law, attacked the claim of merchant vessels to carry armament for defensive purposes, on the ground that they had no right to defend themselves against attack by an enemy warship.<sup>1</sup>

In the same year Dr. Georg Schramm, legal adviser to the German admiralty, in a book entitled *Das Prisenrecht in Seiner Neuesten Gestalt* took the same position. He argued that resistance on the part of a merchant vessel, even for the purpose of defense, operated to forfeit its immunity as a peaceful trading ship and it could therefore be sunk without regard to the formalities required in respect to the sinking of such ships.

<sup>1</sup> See his views in 26 *Annuaire de l'Institut* (1913), pp. 515-516. Also his article *Der Widerstand Feindlicher Handelsschiffe gegen die Aufbringung*, in 8 *Zeitschrift für Völkerrecht* (1914), pp. 378-406.

<sup>2</sup> See especially pp. 308-310 of his work. Other German writers, however, admitted the right of arming for defense, for example, Niemeyer in 26 *Annuaire de l'Institut*, p. 519; Wehberg, *Das Seekriegsrecht* (1915), pp. 284 ff., and Perels, *Manuel de Droit Int.* (ed. by Arendt, 1884), p. 195.



This view of the matter was adopted and acted upon by the German government during the World War. At the outset, the British government announced that "a certain number" of British merchantmen had been armed as a "precautionary measure for the purpose of defense, which under existing rules of international law was the right of all merchant vessels when attacked." The German government promptly protested on the ground that the right of armed merchant vessels to resist an enemy warship was "contrary to international law" and insisted that such vessels were not entitled to be admitted to neutral ports on a footing of equality with armed merchantmen.<sup>1</sup> The American government made a distinction between merchantmen armed solely for defensive purposes and those armed for purposes of offense, the former of which would be admitted to American ports as ordinary vessels of commerce. At first the criteria adopted for determining the character of the vessel were the number, caliber and position of the guns, etc., but later it adopted the sounder test, namely, whether the vessel carried a commission or order issued by its government directing the master to engage in aggressive operations.<sup>2</sup> Neutral powers like the United States treated merchantmen armed for purely defensive purposes as ordinary vessels of commerce and allowed them to enter their ports and to avail of the privileges which were usually accorded to such vessels.<sup>3</sup> The government of the Netherlands appears to have been the only neutral government which refused to permit them to enter its ports on a footing of equality with unarmed merchant vessels. It admitted the right of merchant vessels to carry armament for purposes of defense but it denied that neutrals were bound to allow them to enter their ports on the same footing as unarmed vessels.

<sup>1</sup> Memorandum of Oct. 15, 1914, text in U. S. White Paper, *European War*, No. 3, pp. 238-241.

<sup>2</sup> Memorandum of March 26, 1916, text, *ibid*, pp. 188 ff.

<sup>3</sup> Fauchille, *op. cit.*, p. 390. As to the policy of Chile, see Alvarez, *op. cit.*, p. 258.

It made no objection, however, to the admission of *neutral* merchantmen armed for defensive purposes.<sup>1</sup>

At first the German government, although denying the right of merchantmen to carry armament without forfeiting their immunities as trading ships, refrained from treating them as war vessels. But in February, 1916, it announced that beginning on March 1, it would regard all such enemy vessels encountered on the high seas as auxiliary cruisers and they would be sunk whenever possible without warning. This policy was based on the allegation that British merchantmen, generally, had been armed, that their masters carried instructions directing them to conduct offensive operations and that they had in a number of instances attacked German submarines. The British government denied these charges and they were not in fact substantiated,<sup>2</sup> but whether they were true or not, German submarine commanders thereafter carried out their instructions ruthlessly and with remarkable success, large numbers of enemy merchantmen being sunk in the manner described above in connection with the discussion of submarine warfare.

In general, the German defense was that the position of a merchant vessel is analogous to that of a non-combatant person in land warfare; as such a person cannot offer resistance without forfeiting his right to be treated as a prisoner of war if captured, so a merchant vessel cannot resist attack by an enemy war vessel or submarine without forfeiting its immunity as a vessel of commerce. Furthermore, the right of merchantmen to carry armament, once generally admitted, had ceased to exist with the disappearance of pirates and the abolition of privateering, against which the right was originally designed to afford protection. The original reason for the rule having therefore ceased to exist, the right had disappeared with it. This

<sup>1</sup> Orange Book, *Min. des Affaires Etrangères. Recueil de Diverses Communications*, etc., Sept. 1916, p. 193.

<sup>2</sup> The evidence is reviewed in my work cited above, Vol. I, pp. 395 ff.

argument, however, was hardly conclusive. In the first place, the analogy referred to was not sound because it failed to distinguish between the position of a non-combatant in *occupied* territory and his position in *unoccupied* territory.<sup>1</sup> Under article 2 of the Hague Convention, respecting the laws and customs of war on land, he has a clear right to resist an invader and he is not required to be a member of an organized force to be entitled to treatment as a prisoner of war if he is captured. Unless therefore, the portion of the sea in which the resistance of an armed merchant vessel is offered, can be assimilated to the status of occupied territory in land warfare, the analogy rather supports than denies the right of resistance. The argument that the right had ceased with the disappearance of piracy and the abolition of privateering was still less convincing. The Germans frankly admitted that the right of merchantmen to arm had been continued and recognized after the disappearance of piracy, in order to enable them to resist privateers. But until 1856 at least, the status of a privateering vessel whose commander carried a commission issued by a recognized belligerent government was legally no different from that of a submarine or cruiser. If, therefore, it was permissible to resist the unlawful attacks of the former, it was equally legitimate to resist those of the latter. The conclusion would seem to be that the original rule was never intended to be limited in its application to defense against any particular class of vessels but included the right of defense against unlawful attacks from any and every

<sup>1</sup> Compare an article by Professor Oppenheim, entitled, *Die Stellung der Feindlichen Kauffahrtschiffe*, in 8 *Zeitschrift für Völkerrecht* (1914), pp. 169 ff. Professor Oppenheim in his refutation of the contentions of Dr. Schramm also pointed out that in denying the right of resistance he failed to distinguish between the rights of *neutral* and *enemy* merchant vessels. It is the duty of neutral merchantmen to submit to search without offering resistance but no such duty rests upon an enemy merchantman because the other belligerent has no right to search it, although he has a right to capture it. Compare on this point also Higgins, "Armed Merchant Ships," in 8 *Amer. Jour.*, p. 705; Fauchille, *op. cit.*, p. 387; and Scott, 10, *Amer. Jour.*, p. 867.

quarter.<sup>1</sup> Considering the methods of the German submarine commanders—which the Five Power Washington Treaty of 1922 virtually stigmatized as acts of piracy—the necessity of admitting the right of defense has been accentuated rather than diminished by the introduction and use of the submarine as a commerce destroyer. To maintain that merchant vessels have a right to arm and defend themselves against pirates and privateers but that they have no such right as against submarines which attack without the formalities of visit, search or warning and without making provision for the safety of non-combatant persons on board, is neither logical nor reasonable. Manifestly, however, the exercise of the right of resistance ought to be limited to defense against acts which are contrary to the established rules governing visit, search, capture and destruction, but it should include the right to forestall an unlawful attack as well as to resist such an attack after it has begun.<sup>2</sup>

The necessity on the part of belligerents of being obliged to arm their merchant vessels for purposes of defense against unlawful acts of the enemy is, however, regrettable because there is no precise test for distinguishing between armament for defensive and offensive purposes nor is it easy to draw the line between resistance which constitutes legitimate defense and that which is aggressive. If the practice of arming merchantmen, therefore, should become general in the future it is certain to multiply controversies between belligerents themselves and between belligerents and neutrals and at the same time result in the destruction of many innocent merchant vessels. It has

<sup>1</sup> Compare Higgins *Defensibly Armed Merchant Ships and Submarine Warfare* (1917), p. 26.

<sup>2</sup> Compare Fauchille, *op. cit.*, p. 388, and C. P. Anderson (*Procs. Am. Soc. of Int. Law*, 1917, p. 18), the latter of whom remarks: "It can be said that the position of the Allied powers, including the United States has been, throughout the war, and still is, that submarines when used as commerce destroyers in the manner employed by Germany, are outlaws, and that merchant ships may attack them on sight in self-defense without losing their status as peaceable vessels."

been proposed, therefore, that the powers should by international agreement renounce the right of arming their merchant vessels and at the same time agree to prohibit the destruction of merchant vessels in war. If this were done the excuse and the necessity for the maintenance of the practice would largely disappear, assuming of course that the engagement in respect to the non-destruction of merchant vessels were scrupulously observed.<sup>1</sup> It is believed that this would be a reasonable and just solution of the problem.

Such were some of the new instrumentalities and agencies of combat employed for the first time on an extensive scale, during the World War and such were the questions of international law to which they gave rise and the interpretations which were placed upon them. There were also many other practices and methods employed by the belligerents either for the first time or upon an unprecedented scale, which gave rise to questions of international law about which there was much controversy. The limits of this lecture do not permit a discussion of them. The taking of hostages on an unprecedented scale, especially by German commanders, for a great variety of purposes and notably as a means of insuring the good conduct of the civil population in the territories invaded by the German armies, marked the

<sup>1</sup> Such a proposal was made by Sir Graham Bower in the *Contemporary Review* for November, 1917. But the proposal is criticized by Woolsey in 12 *Amer. Jour.*, p. 372. A Committee of the Grotius Society submitted a report on the legal status of submarines at the meeting of the Society in 1917 in which it recommended that "if the destruction of enemy merchantmen before adjudication by a prize court be entirely prohibited, it should be unlawful for a belligerent state or its subjects to arm merchantmen.....with guns or other weapons for purposes of offense or defense against prospective attacks of submarines or other war vessels." Sir John MacDonell, a member of the Committee, dissented and gave ten reasons for his dissent. The recommendations finally adopted by the Society looked toward the abolition of the destruction of merchant vessels, but nothing was said in regard to the unlawfulness of their arming. *Transactions*, Vol. IV (1918), pp. xxxi-xlix.

revival of an ancient practice which in the nineteenth century had almost fallen into desuetude. The shooting of them in some cases on account of the alleged commission of hostile acts by the civilian population marked the return to a barbarous practice which had rarely been followed since ancient times. Still more reprehensible was the German practice in a good many well established instances of employing the civilian population as screens or shields for the protection of their advancing columns against attack by the inhabitants. They justified both of these extreme practices as a legitimate measure of protection against what they characterized as an "unorganized people's war" conducted against them by the civil population.<sup>1</sup> The practice, however, was severely criticized as barbarous and unjustified and such it seems to have been. The devastation by the Germans of extensive regions in France including the systematic destruction of the coal mines was likewise denounced as cruel and without military justification, but it too was justified by the Germans as a legitimate measure of military necessity.<sup>2</sup> There were many charges, particularly against the Germans, for having bombarded undefended places and for bombarding defended places without notice, both in violation of the Hague conventions. The bombardment of summer resort towns and fishing villages on the coast of England, in which there were no troops, no means of defense and no works of a military character—and this in the darkness of night and without warning—was especially denounced as a violation not only of the international conventions, but of the sacred rights of non-combatants. There was also much criticism of the Germans for destroying during the course of their bombarding operations large numbers of historic

<sup>1</sup> The details regarding the German practice of hostage-taking and the employment of civilians as screens against attack are given in my work cited above, Vol. I, Ch. 12.

<sup>2</sup> Details, *ibid.*, Ch. 13.

monuments, churches, cathedrals, castles, city halls and institutions devoted to science, art, education, charity and the like,—all of which the Conventions declare to be immune from attack. The destruction of so many objects of this character, many of which were artistic treasures which were, in a sense, the common heritage of civilization, was one of the most regrettable features of the war. Here again the Germans attempted to justify their acts on the ground of military necessity or as legitimate acts of reprisal. There were instances no doubt where destruction was unavoidable or otherwise justifiable, but there were others where it was not, and there were cases where the evidence indicates that it was in part wanton.<sup>1</sup> There were of course, many charges in regard to violations of the Red Cross Convention, the maltreatment of prisoners and the abuses of the rights of the inhabitants of territory under military occupation.<sup>2</sup> Never before had the laws of war been systematically violated on so large a scale. In many cases the accused belligerent admitted the truth of the charges, but pleaded the excuse of military necessity or invoked the right of reprisal. All the belligerents were undoubtedly guilty of particular violations, but the Germans were undoubtedly the most frequent and flagrant offenders. They rarely hesitated to employ any instrument or adopt any method, the employment of which would conduce to the achievement of the object of the war and the shortening of its duration. This was in accord with their traditional military philosophy. If the instrument or method could not be employed without violating the Conventions, they argued that the latter were not binding because they had not been ratified by all the belligerents, or if so, their rules were inapplicable to newly invented weapons or to changed and unforeseen conditions. In any case, there always remained the resource of

<sup>1</sup> Details, *ibid*, Chs. 17 and 18.

<sup>2</sup> *Ibid*, Vol. I, Ch. 20; Vol. II, Chs. 21-22, and Chs. 23-26.

reprisal and the argument of military necessity, one or the other of which was almost daily relied upon as an excuse for the disregard of the law. When charged with employing a prohibited weapon or adopting a forbidden method they usually replied that the enemy had first employed or adopted it and if there were no foundation for this charge the "illegal" "starvation" blockade could be invoked as a justification for any and every measure employed to overcome a cruel and ruthless enemy. Finally, the doctrines of military necessity and of *Kriegsraison* were broad enough to cover acts which could not be justified on other grounds. Germany's very existence was at stake; a war had been forced on her by a group of powerful states whose avowed intention was to destroy her; they had repudiated the Declaration of London and were endeavoring by means of their naval power to starve the women and children of Germany, etc. Under these circumstances the German government was, as it said in its note of Jan. 31, 1917, to the American government, justified in employing "all the weapons which are at its disposal." Even the invasion and occupation of Belgium and Luxembourg were defended as acts of military necessity.<sup>1</sup> But the fact is, that throughout the war the Germans constantly confused military necessity with strategical interest and military convenience and whenever the latter could be subserved by a particular measure or act (such as the invasion of Belgium) the argument of military necessity was invoked as a justifiable defense. Manifestly the result of such an interpretation was to convert the exception into the rule; to make strategical interest the only test of a belligerent's right and to render illusory the limitations and restrictions which the international conventions sought to impose on the conduct of military commanders.

<sup>1</sup> See the German defense and the analysis thereof, *ibid*, Vol. II, Ch. 28.



## LECTURE VIII

### Interpretation and Application of International Law during the World War (continued)

The World War was unique in that nearly all the important maritime powers were belligerents, and many controversies arose involving important questions of international maritime law, both old and new. In consequence of the naval supremacy of Great Britain and her allies the surface-navigating vessels of their adversaries were very early driven from the seas, but by means of submarines and mines the latter were able to carry on effective operations against the commerce of the former, and, it may also be added, against neutral commerce. At the very outbreak of the war, the Germans planted automatic contact mines in the open waters of the North Sea and the Austrians did likewise in the Adriatic Sea. In a number of cases both enemy and neutral merchant vessels ran into them and were blown up. The mines so laid do not appear to have been of the type which become harmless after breaking loose from their moorings, nor did the belligerents laying them appear to have taken the precautions necessary to insure peaceful shipping against destruction by them, in accordance with the requirements of the Hague Convention. This practice was denounced in England as a "callous," "diabolical" and "inhuman" mode of warfare and neutral governments, some of whose commercial fishing vessels were victims, vigorously protested against it.<sup>1</sup> Unfortunately, however, the Hague convention does not absolutely prohibit the laying of mines in the open seas and its phraseology

<sup>1</sup> See for example, the protest of the Dutch government of Sept. 18, 1915.

is such as to leave belligerents a considerable latitude which may be interpreted so broadly as to render quite illusory what was intended as a prohibition in some measure.<sup>1</sup> The English delegation at the second Hague Conference urged the absolute prohibition of the laying outside the territorial waters of belligerents of mines which do not become harmless upon breaking loose from their moorings and the Institute of International Law at its meeting in 1906 had approved this rule,<sup>2</sup> but as stated above, the Convention adopted did not go to this length. Nevertheless, it was pointed out during the World War that independently of the Hague Convention the high seas are free and neutral ships of commerce have a right to navigate them without being exposed to the danger of destruction from mines laid by belligerents. The sowing in them of unanchored contact mines and of anchored mines which did not become harmless upon breaking loose from their moorings was therefore a clear infringement upon the established customary rule of the law of nations in respect to the freedom of the seas.

Germany having once violated this rule her enemies were driven as they claimed, to follow her example as a means of defense and as a measure of reprisal. The British admiralty on November 3, 1914, announced that in consequence of the German practice the whole of the North Sea would be regarded as a "military area" in which mines would be planted and this area was extended from time to time by successive Orders in Council. The German government soon retaliated by a decree of February 4, 1915, declaring all the seas surrounding Great Britain and Ireland, including the whole English channel to be "comprised within the seat of war," within which all enemy merchant vessels encountered would, if possible, be sunk.

<sup>1</sup> Compare Higgins, *op. cit.*, p. 343; Lémonon, *op. cit.*, p. 499, and the remarks of Sir Ernest Satow at the Second Hague Conference, *Actes et Docs.* III, 380.

<sup>2</sup> *Annuaire* (1906), p. 88.

Neutral powers were therefore warned against entrusting their crews, passengers or merchandise to such vessels. In January, 1917, the German government went to the limit of declaring the whole North Sea, including the waters surrounding the British Isles, extending north to the Faroe islands and westward from France and England to a distance of about 500 miles and embracing also a large part of the Mediterranean Sea, to be a "barred zone" in which, with some trifling exceptions "all sea traffic would be opposed by means of mines and submarines." Neutral, as well as enemy merchant vessels, subject to a few exceptions, entering these vast areas of the seas embracing more than a million square miles, would, if possible, be sunk without warning, and without provision being made for the safety of the persons on board. This extraordinary measure was attempted to be justified as a legitimate act of retaliation against an enemy which it was alleged was using its naval power to starve the German people into submission "in contempt of international law." Even admitting the truth of the charge against Great Britain such a measure which assumed to close vast areas of the open seas to neutral commerce was wholly indefensible. The measures of both Great Britain and Germany constituted clear violations of the freedom of the seas and severe encroachments on the long established rights of neutrals, although the conduct of the British government was less reprehensible. Germany had inaugurated the practice of indiscriminately scattering mines in the open seas and her enemies claimed the right to retaliate. Moreover, the British government maintained that its own policy was a necessary measure of defense against German attacks on the British coast. But differing from the German policy the British measure left open certain specified routes through the "military area" which it proclaimed, and through which neutral vessels could safely navigate, by following directions furnished their masters by the British admiralty. In fact no neutral vessels navigating this area were ever destroyed by running into British

mines. Apart therefore from the delays and inconveniences to which neutral vessels were subjected by being required to follow prescribed routes, the British measure was not objectionable. Finally, the British orders contained no threat that enemy merchant vessels encountered in the proscribed zone would be destroyed either after or without warning. The German barred zone decrees, however, made no such provision to insure the safety of neutral commerce. Enemy merchant vessels in the barred zone would be destroyed even if it were not possible to spare neutral merchandise on board and under the decree of January, 1917, no distinction was to be made between enemy and neutral vessels—all were to be destroyed alike and without observing the customary rule relative to the safety of crews and passengers. Protests against the German measure were ineffective and its threat was carried out on an extensive and ruthless scale.<sup>1</sup>

Measures such as these by which belligerents asserted and exercised the right to close vast portions of the high seas to neutral commerce or to subject it to grievous restrictions, were without precedent in former wars. No writer on international law before the recent war could be found to defend a belligerent right so extraordinary and unprecedented. It was admitted that the portions of the sea in which active naval operations take place might be regarded as war zones in the sense that neutral vessels which enter them at the time, somewhat as a non-combatant in land warfare who strays into the lines and is injured, must assume the risk of danger to which they are exposed in consequence of the operations which are taking place, but no one ever went so far as to claim that a belligerent might proclaim vast areas of the sea to be barred zones from which neutrals might be absolutely excluded for the duration of

<sup>1</sup> The matter is discussed in my work cited above, Vol. II, Ch. 14. See also Hyde, *op. cit.*, II, Secs. 716 ff. ; Fauchille, *op. cit.*, secs. 1271 and 1316, and Merignhac and Lémonon, *op. cit.*, Vol. II, Ch. 3.

the war or might be allowed to traverse them subject only to such conditions and restrictions as he might see fit to prescribe. Such a claim was based on the inadmissible assumption that the sea may be "occupied" by the naval forces of a belligerent in somewhat the same manner that territory in land warfare may be occupied by an invading army, and that the "occupying" belligerent may treat it as being under his exclusive jurisdiction. Manifestly the recognition of such a claim would render the principle of the freedom of the seas illusory.

The rights of belligerents under the naval bombardment convention of the Hague became a subject of controversy in connection with the bombardment by German naval forces of English coast towns. In December, 1914, several German cruisers descended upon the English coast and without warning and during the night bombarded the towns of Hartlepool, Scarborough and Whitby and on several subsequent occasions made similar "raids" upon Lowestoft, Yarmouth and other English towns. A considerable number of the inhabitants, all of them non-combatants, many being women and children, were killed by the fire from the attacking cruisers. None of the towns were fortified or "defended" in the sense of being occupied by soldiers or equipped with batteries and there appear to have been no military works or supply depots in any of them. Scarborough was in fact, nothing but a summer resort town. In answer to the protest against what was generally regarded as a cruel and unjustifiable attack, the Germans asserted that there were signalling and wireless stations, military buildings, and even batteries in some or all of the towns—all of which was emphatically denied by the British authorities—and that the injury inflicted upon the non-combatant population was unavoidable and incidental. Notice of the intended bombardment could not be given without imperilling the success of the operations and it was not required in such cases by the Hague Convention. Finally, as in so many other cases, Germany fell back upon the right of reprisal, charging the allies with having

bombarded various open towns of the enemy, and if this were not sufficient, the inhuman attempt to starve the German people by means of an unlawful blockade afforded justification enough. By these processes, the obligations of the Hague Convention were argued out of existence. The fact is, all towns on the coast of England were regarded by the Germans as "defended" and whenever possible they were bombarded without distinction and without regard to the rules governing naval bombardment. It would seem to be a fair conclusion that if the Hague Convention allows the bombardment of such towns as Scarborough, in particular, and in the manner in which it was done by the Germans, its prohibitions and restrictions are quite useless, for under such an interpretation it would be hard to imagine a town so circumstanced as to be immune from bombardment.

The World War, in so far as its operations were carried on at sea was, as I have said, unique in that the naval operations on one side were conducted in the main by means of submarine torpedo boats. This mode of warfare and the questions of international law to which it gave rise, I have already discussed in the preceding lecture. As practised by Germany and Austria it was not confined to the naval forces or commerce of the enemy, but was directed also against neutral commerce. From first to last some 1,700 merchant and fishing vessels of neutral nationality were sunk by German or Austrian submarines (mostly German) and with them the lives of thousands of non-combatants, seamen and passengers on board were lost.<sup>1</sup> With the exception of the Russo-Japanese war of 1904-05, during which eight neutral merchantmen had been sunk by the Russians; there had been no war in which such a practice had been resorted to. As pointed out in a previous lecture, the British government protested against the sinking by Russian cruisers of

<sup>1</sup> See details in my work cited, Vol. II, Ch. 31; also F. E. Smith, *The Destruction of Merchant Vessels under International Law*; and Merignhac and Lémonon, *op. cit.*, Vol. II, Ch. 3.

neutral merchantmen as a "serious breach of international law" and an "outrage" for which Russia was compelled to make reparation. This was the general opinion, especially in England, in regard to the destruction of neutral merchant vessels. The prize regulations of a number of states, however, recognized the right of destruction in exceptional cases and there was considerable legal authority in favor of it. At the Second Hague Conference the British delegation proposed that the destruction of neutral prizes be prohibited absolutely, but on account of the opposition to it, no decision was reached. The discussion was renewed at the London International Naval Conference in 1908-09, when the British government again pressed for the adoption of the rule of absolute prohibition, but it ultimately yielded and the rule finally adopted affirmed the general principle that a neutral merchant vessel cannot be destroyed, but must be taken in by the captor for adjudication by a prize court. By way of exception, however, the right of destruction was admitted in cases where the taking of the ship into a home port would involve "danger" to the captor or to the "success of the military operations in which he was at the time engaged."<sup>1</sup> But it was provided, that before proceeding to the destruction, the captor must in all cases provide for the safety of all persons on board and preserve the ship's papers for the use of the prize court.<sup>2</sup> Like other international conventions, the language employed was somewhat indefinite and vague. No tests are laid down for determining what constitutes "danger" and what is permissible under the pretext of "success." The employment of such elastic terms leaves belligerents, therefore, a very large discretion. Germany, for example, maintained that the inability of the captor to spare a prize crew, with which to take the vessel in, would justify its

<sup>1</sup> Art. 49.

<sup>2</sup> Art. 50.

destruction, and her prize code so affirmed. As to this claim, however, the Declaration of London was silent.

The larger number of neutral merchantmen destroyed by the Germans were sunk by submarines in the manner described in my last lecture. Not possessing accommodation for the crews and passengers found on board, they were set adrift in life boats or were drowned, and no warning or only insufficient warning was given. The reason alleged in most cases by the Germans for destroying neutral vessels of commerce was that they were engaged in transporting contraband. The Declaration of London allowed neutral vessels to be sunk in the abovementioned exceptional cases, provided they were liable to condemnation by a prize court and they were so liable if at least half the cargo on board consisted of contraband goods.<sup>1</sup> But liability to condemnation could only be determined by stopping the vessel, examining its papers and inspecting the cargo. This essential formality German submarines rarely observed. They sank vessels at sight without examining their papers, without verifying their nationality and without attempting to determine whether the contraband goods on board constituted half the cargo or not. Moreover, according to the Declaration of London,<sup>2</sup> as well as the German prize code itself,<sup>3</sup> *conditional* contraband was not liable to condemnation unless destined for the armed forces or government of the enemy; ships carrying it therefore, could not be lawfully sunk unless it was so destined. German submarine commanders, however, made no distinction in this respect. All towns on the English coast were regarded as "fortified" places or as places serving as "bases of supplies" for the armed forces, and neutral vessels laden with either class of contraband destined to such ports were sunk without distinction. Since nearly all goods were treated as contraband,

<sup>1</sup> Art. 40.

<sup>2</sup> Art. 49.

<sup>3</sup> Art. 32.



few commerce-carrying neutral vessels were exempt from destruction under the German interpretation of belligerent rights. In consequence of the German policy, which was little short of indiscriminate depredation, the merchant marines of some of the smaller European states, notably those of Norway, Denmark, Sweden, and the Netherlands were nearly destroyed.<sup>1</sup> As stated above, this practice was unprecedented in former wars and it was not resorted to at all during the World War by Germany's enemies. It cannot be assumed to have been the intention of the international conventions to sanction such wholesale and indiscriminate destruction of neutral commerce, although it must be admitted that the vagueness and elasticity of the language in which their restrictions and prohibitions are formulated leave belligerents so wide a discretion that it is possible for them to turn the exception into the rule, as the Germans did. The circumstances under which neutral commerce may be destroyed by belligerents should be more precisely defined since the existing restrictions afford very inadequate protection to what has heretofore been regarded as fundamental rights.

It was almost inevitable that in a maritime struggle of such vast magnitude as that of the World War, neutrals should have suffered grievously even if belligerents had shown a more scrupulous disposition to respect their rights. Unfortunately, there was no such disposition, although naturally some of the belligerents were more considerate and respectful of neutral rights than others. In respect to the destruction of neutral vessels the conduct of the allied and associated powers was irreproachable and there appear to have been no instances in which such vessels were sunk by their naval commanders and it was asserted by the British government that no non-combatant life was ever lost through the action of the British naval forces.

<sup>1</sup> See the statistics in my work cited, Vol. II, p. 278.

In other respects, however, the conduct of the allied and associated powers was less free from criticism although there is a difference of opinion as to whether they went beyond the limits which reason, equity and the peculiar conditions justified. There was much criticism in neutral countries of the action of the allied powers in disregarding the rules of the Declaration of London in respect to trade in contraband, particularly those which made a distinction between absolute and conditional contraband and which laid down different rules in regard to the liability of the two classes of goods to capture. At the outset, they placed upon their lists of contraband articles which were on the free list of the Declaration of London and treated as absolute contraband many articles which were there listed as conditional contraband. Finally, in April, 1916, they formally abandoned the attempt to preserve the distinction between the two classes of contraband and each belligerent replaced its existing lists by a single list of articles which were to be treated as contraband without distinction as to whether it was conditional or absolute and the same rule was to be applied to both classes alike in determining their liability to capture. As finally issued the lists of contraband were very extensive and included hundreds of articles which in former wars had never been regarded as contraband.<sup>1</sup>

Against these measures neutral governments protested vigorously; they readily admitted that the lists embodied in the Declaration of London were not intended to be final and that they might be altered by belligerents, but they denied that this right could be exercised arbitrarily. They pointed out that independently of the Declaration of London a belligerent has no lawful right to treat as contraband goods which are not so

<sup>1</sup> Details in my work cited, Vol. II, pp. 285 ff. The lists of contraband published by the various belligerent governments from time to time may be found in the United States White Paper, *European War*, No. I (1915).

in fact and as to the distinction between the two categories of contraband that was an old and universally recognized distinction and could not be disregarded arbitrarily by belligerents. To these protests, the British government, in particular, replied that belligerents must, within reasonable limits, be the judges of what is contraband; that under modern conditions the number of articles which are capable of military use, directly or indirectly, is vastly greater than it was formerly; that cotton, for example, which in former wars had been treated as non-contraband, was being used extensively by the Germans for the manufacture of explosives, and the same was true of chemicals and various other articles. And as to foodstuffs, which in former wars had been treated as contraband only when destined for the use of the military or naval forces of the enemy, they must now be considered as contraband under all circumstances even if intended for the use of the civil population because the distinction between the armed forces and the civil population so far as trade in contraband was concerned had lost all practical significance. So large a proportion of the inhabitants of the enemy country were taking part in the war, directly or indirectly, that the old rule which treated goods intended for their use as non-contraband while those intended for the armed forces could be seized as contraband was illogical and rested upon no sound principle. Moreover, the German government had by a series of measures assumed practical control over the distribution of foodstuffs throughout the Empire so that food destined for the use of the civil population could easily be diverted to the armed and naval forces.<sup>1</sup> Under these circumstances, enemy destination and not intended use was the only reasonable and logical test of the liability of foodstuffs to capture.

<sup>1</sup> For the American protest and the British reply see the American White Paper, *European War*, No. 1, pp. 39 ff.

A British practice which provoked much stronger protest, particularly on the part of the United States, then neutral, was the policy of taking neutral vessels suspected of carrying contraband, into English ports for the purpose of conducting searches.<sup>1</sup> The American government asserted that the taking of neutral vessels in for such purposes on mere suspicion was contrary to the established rules governing visit and search and that the long detentions which it involved exposed the owners, especially of perishable cargoes, to ruinous losses—all the more so because the British government threw upon the owners the expense of detention.<sup>2</sup> Searches for the purpose of discovering evidence of the contraband character of goods, could, it maintained, only be made at sea at the time and place of capture.<sup>3</sup> To this contention the British government replied that reasonable suspicion justified the taking in of a neutral vessel for further examination when by reason of the character and proportions of the cargo a thorough search could not be conducted at sea; that American naval commanders had, in fact, followed this practice during the Civil War and that during the Russo-Japanese and Balkan wars the British government had acquiesced in this practice in respect to British merchantmen. During the present war this procedure was all the more necessary owing to the existence on a large scale of fraudulent practices by which contraband was ingeniously concealed or disguised

<sup>1</sup> In a note of October 21, 1915, Secretary Lansing gave a list of some 300 American vessels that had been detained in British ports for one reason or another, mostly for the purpose of search. *European War*, No. 3, pp. 40-49. See also a more extended list in the *Cong. Record*, for Jan. 11, 1916, pp. 95 ff.

<sup>2</sup> See in this connection the case of the *Baron Stjernblad*, where the House of Lords held that claimants were not entitled to any costs or damages on account of the detention of a neutral vessel laden with contraband goods, seized on reasonable suspicion of ultimate enemy destination but which was subsequently released. *Brit. and Col. Prize Cases*, Vol. III, p. 17.

<sup>3</sup> See Mr. Lansing's notes of Dec. 26, 1914, and Oct. 21, 1915, *European War*, No. 1, p. 39, and No. 3, p. 25.

through imitation. In any case, owing to the size of modern steamships and the enormous volumes of their cargoes, it was often impossible to verify the character of the goods by search at sea, especially during rough weather; it was therefore necessary to take them into calm waters, where the cargo could be removed, and the parcels opened, otherwise, the right of search would in many instances be of little value to a belligerent.<sup>1</sup> "Probable cause," if not "reasonable suspicion" had in practice been recognized by the American Supreme Court during the Civil War and the war with Spain as a sufficient justification for the procedure,<sup>2</sup> and the line of demarcation between probable cause and reasonable suspicion is not capable of precise determination.<sup>3</sup> It would seem, therefore, that if the belligerent right of search is to be maintained or is not replaced by some form of certification which will render search unnecessary, the captor should be allowed to take the vessel in for more thorough examination than is often possible at sea. Reasonable suspicion of the presence of contraband should be a sufficient justification, though in all such cases the captor should be held liable for the expense of detention and for damages sustained by the claimant if the evidence fails to reveal the presence of contraband.<sup>4</sup>

Closely related to the practice of taking neutral vessels in for the purpose of search was the British policy of removing

<sup>1</sup> See the notes of Sir Edward Grey of Jan. 7, and Feb. 10, 1915, and the memorandum of April 24, 1916, *European War*, No. 1, pp. 41 and 44, and *ibid* No. 3, pp. 64 ff. The latter contains a report of Admiral Sir John Jellicoe affirming the necessity of the British procedure under modern conditions. See also Pyke, *Law of Contraband*, p. 201, where the difficulties of search at sea are pointed out; Hyde, *op. cit.*, II, 443; and Admiral Stockton in 14 *Amer. Jour.* 363.

<sup>2</sup> See a letter of A. Maurice Low in the *New York Times* of Dec. 24, 1914, and the case of the *Olinde Rodriguez*, 174 U. S. 510 (1899).

<sup>3</sup> See the opinion on this point of the British prize court in the case of the *Kronprinz Gustaf Ador* (1917), *Brit. and Col. Prize Cases*, Vol. II, p. 419.

<sup>4</sup> Compare Hershey in 10 *Amer. Jour.* p. 583, and Allin in *Minn. Law Review*, 1917, pp. 19 ff.

from neutral steamers their mails and carrying them to London for examination, for censorship and in some cases for detention or confiscation. This practice was adopted in consequence of the attempt of the Germans to use the international postal service as a means of evading the allied restrictions in respect to contraband and blockade. Among the parcels taken from neutral vessels were found large quantities of such articles as rubber, platinum, jewellery, chemicals, food, shoes and even pistols and many other articles which were on the list of contraband and which though generally addressed to persons in neutral countries had originated in or were ultimately intended for delivery in enemy territory. Against the British practice the governments of the United States, the Netherlands, Denmark, Norway and Sweden protested and the Swedish government went to the length of retaliating by refusing to allow British mails to be transported through Sweden to or from Russia and by prohibiting the exportation of wood pulp to England. The American government admitted that parcels mails were subjected to the same treatment as articles sent by express or freight so far as the right of search, seizure or condemnation was concerned, but it contested the right of belligerents to take mail steamers into their ports for purposes of search and there subjecting them to the local jurisdiction or to assume jurisdiction over those which had voluntarily touched at their ports. It also complained of the long delays and sometimes ruinous losses to which neutral business men were exposed in consequence of the detentions.<sup>1</sup>

The 11th Hague Convention clearly establishes the inviolability of *correspondence postale* found on neutral steamers except

<sup>1</sup> American White paper, *European War*, No. 3, pp. 145-151. The correspondence between the Dutch and British governments may be found in 24 *Rev. Gén. Docs.*, pp. 79 ff.; that between the Swedish and British governments in a British Parl. paper *Misc.*, No. 28 (1916), Cd. 8322. See also the Norwegian Orange Book issued in 1916, pp. 28 ff.

that destined to or proceeding from a blockaded port but it is evident from the language employed and from the understanding of those who took part in the discussion at the Hague Conference that the immunity was not intended to cover merchandise or parcels mail.<sup>1</sup> The British and French governments defended the Allied policy largely on this ground. A very considerable contraband trade was being carried on with Germany through the medium of the postal service, such as the Hague Convention never intended to authorize. It was necessary to take the mails into a home port where they could be more thoroughly examined than was possible at sea; the allied governments denied that they had ever made any distinction in treatment between mails seized on vessels on the high seas and those found on neutral vessels compulsorily diverted to their ports; moreover, the Germans themselves had destroyed neutral mails on the ships which they had sunk and neutral governments had not protested against it; etc.; finally, in the enforcement of their right to prevent contraband traffic under cover of the postal service they were causing neutrals as little injury as possible.<sup>2</sup> It was inevitable that such interferences with neutral mails should have provoked vigorous protests and in some cases no doubt wrongs were committed but it would seem that the general principle underlying the Anglo-French policy was not unreasonable considering the very extensive use which was being made of the postal service for carrying on contraband trade with the enemy, which could not be carried on as ordinary commerce. It is practically certain that neither the letter nor the spirit of the Hague Convention ever intended to protect such traffic. If they did, the right of belligerents to prevent trade in contraband with the enemy could in large

<sup>1</sup> *La Deux. Conf., Actes et Docs.*, III, 1122.

<sup>2</sup> See the allied memorandum of October 12, 1916, in *European War*, No. 4, p. 53.

measure be circumvented as it was in fact being done when the Allied governments took steps to put a stop to it.<sup>1</sup>

The policy of the British government in extending the doctrine of continuous voyage, or more properly the doctrine of ultimate destination, to the transportation of conditional contraband to neutral ports, provoked still more vigorous protests from neutral governments. As has been said, the British government in March, 1916, abolished the distinction between absolute and conditional contraband and announced that thereafter the rule of ultimate destination would be applied to the carriage of all contraband without regard to its character. This decision was attacked as being contrary to both the Declaration of London (Art. 35) and the existing usages of nations and would, if enforced, practically put an end to commerce with neutral countries adjacent to Germany because nearly all merchandise had been placed on the list of contraband. As such it would be a grave and unwarranted infringement upon the long established rights of neutrals to trade with one another in goods which had always been regarded as conditional contraband.<sup>2</sup>

Sir Edward Grey replied, in substance, that the United States had during the Civil War itself applied the rule against which it was now protesting and he furnished statistics to show that enormous quantities of contraband goods were being consigned to the ports of neutral European countries in close proximity to Germany—quantities far in excess of their pre-war

<sup>1</sup> Compare Hershey in 10 *Amer. Jour.*, p. 583. The questions raised and the controversy which the Anglo-French policy provoked are discussed in my work cited, Vol. II, Ch. 34. See also Hyde, *op. cit.*, sec. 730, who remarks that the essence of the American complaint was not that mail steamers were forced into Allied ports or that jurisdiction assumed over those voluntarily entering was abused but that by "sheer naval force" they were compelled to put into such ports and thus subject themselves to the control of the territorial sovereign (p. 451).

<sup>2</sup> See especially the note of Secretary Lansing to Mr. Page, of Oct. 21, 1915. *European War*, No. 3, pp. 25 ff.



importations and consequently in excess of their local needs. A large number of the shipments were consigned to nominees of enemy agents "(dummy consignees)", individuals or firms which had lately established themselves in these countries for no other purpose than to serve as intermediaries for receiving and forwarding to the enemy supplies mainly from America.<sup>1</sup> Under these circumstances there could be but one conclusion, namely, that a large part of this traffic was not genuine *bona fide* neutral commerce but indirect trade with the enemy. The goods thus consigned to neutral ports never became a part of the "common stock" of the country in which they were landed but were immediately reforwarded to Germany or Austria where they were used for feeding the armed forces of the enemy or for supplying in other ways his military needs. Under modern conditions, with the multiplication of facilities for railway transportation, it was as easy for a belligerent, circumstanced as Germany was, to obtain oversea supplies through the medium of adjacent neutral ports as to obtain them through consignments direct to his own ports. The old rule which made the destination of the ship the test of the liability of the goods to capture was no longer adequate if a belligerent was to be allowed to intercept the transportation of contraband to his enemy. He must therefore be allowed to apply the doctrine of ultimate destination of the goods and to apply it to all contraband because, as stated above, the old distinction between conditional and absolute contraband had for all practical purposes ceased to have any real basis.<sup>2</sup>

<sup>1</sup> The activities and methods of some of these agents were described by Sir Samuel Evans in his decision in the case of the *Kim*. With few exceptions, he said, their transactions were made without invoices, insurance policies, checks or other proofs of payment; special cable codes were invented; some agents assumed English names; some established themselves in hotels; most of them had little or no capital, and the like.

<sup>2</sup> See especially Sir Edward Grey's note of Jan. 7, 1915, *European War*, No. 1, pp. 41 ff., and the Memorandum of April 24, 1916, *ibid*,

It was of course true, as pointed out in the American protest, that the situation during the Civil War was not exactly analogous to that during the World War, particularly since the neutral ports to which the intercepted contraband was consigned in the former war were the ports of small islands where there was little local demand for the enormous quantities of supplies which were landed there, so that the presumption of an ulterior enemy destination was absolutely conclusive. During the World War, however, the neutral destinations were the ports of populous countries where there was a large local demand for the goods consigned thereto—a demand which, it may be added, had been increased by the closing of their pre-war sources of supply. The presumption, therefore, that such goods were intended to be reforwarded to a belligerent country was much less strong than in the case of consignments to destinations, which, like those during the Civil War, were little more than ports of call or transshipment. Nevertheless, the shipments during the World War to the Netherlands and the Scandinavian countries were so far in excess of their pre-war importations as to create a sufficient pre-sumption of an ulterior enemy destination and the methods and activities of enemy agents in those countries were of such a character as to remove all doubt as to this. Under circumstances

No. 3, pp. 64 ff. See also the case of the *Kim* (*Brit. and Col. Prize Cases*, Vol. I, pp. 405 ff.) where the expedients and manœuvres adopted by enemy agents in neutral countries, to evade the contraband restrictions are detailed. Statistics are given and circumstances detailed which would seem to leave little doubt that a large part of the trade with neutral countries in close proximity to Germany was not *bona fide*. See comment on the decision of the prize court by Pyke in the *Law Review* for Jan. 1916, pp. 60 ff. See also an article by Sir Erle Richards entitled "The British Prize Courts and the War" in the *Br. Yr. Bk. of Int. Law*, 1920-21, pp. 11 ff., where the conditions which justified the British policy are luminously explained. The doctrine of ultimate destination as applied by the prize court in the *Kim* case is, however, criticized by C. P. Anderson in 11 *Amer. Jour.*, pp. 251 ff., and by Hyde, *op. cit.*, II, 625.

and conditions such as these the application of the rule of ultimate destination to both classes of contraband would seem to be justified, if the right of a belligerent to intercept the carriage of contraband to his enemy is to be retained. Whether however the burden of proving an innocent destination should be thrown upon the claimant is more open to question. The British order in council of Oct. 29, 1915, reversed the established rule which placed upon the captor the burden of proving a hostile destination and shifted to the claimant the onus of showing that the goods had no such destination. Against this rule the American government protested.<sup>1</sup> In fact, however, the British prize court appears to have put upon claimants the onus of proving a neutral destination only in cases where the consignees were not established and engaged in a *bona fide* business in a neutral country before the war. If they were mere dummy consignees or agents who had lately established themselves there to serve as mere "conduit pipes through which the consignments were to reach the enemy," and especially if they were operating in countries whose imports had largely increased since the outbreak of the war, they were required to prove to the satisfaction of the prize court that the goods were intended for consumption in a neutral country.<sup>2</sup> This they were seldom able to do.

<sup>1</sup> The British government had during the Russo-Japanese War vigorously maintained the rule which it now rejected. Compare Bentwich, *The Declaration of London*, p. 71. Sir Edward Grey in his note of July 10, 1915, to Ambassador Page stated that the principle which places upon the captor the burden of proof had "usually been admitted as a theory," but, he asserted, that in practice it had almost always been otherwise and that goods had seldom escaped condemnation unless the owner was able to prove that their destination was innocent. *European War*, No. 1, p. 50.

<sup>2</sup> Sir Erle Richards's art. cited in *Br. Yr. Book of Int. Law*, 1920-21, pp. 26-27. The rule as applied by Great Britain during the World War is criticized by Hyde, *op. cit.*, Vol. II, p. 619, who declares that it exceeded the limits of belligerent right as laid down in the Declaration of London.

In the enforcement of its measures against trade in contraband the British government altered another established rule, namely, that which limited, in the main, the evidence upon which prizes could be condemned, to such as was found in the ship's papers taken at the time of the seizure of the vessel or which was obtained from interrogatories of the ship's principal officers.<sup>1</sup> By an order in council of August 5, 1914, the prize court rules were changed so as to allow the introduction of extrinsic evidence—that is, evidence obtained from other sources than the ship's papers. The new rule was defended on the ground that it enabled captors to establish the ultimate destination of goods in cases in which it would have been impossible under the old practice, because the ship's papers rarely or never reveal that destination. But with letters, telegrams and other evidence of this kind available, it was often easy to determine whether the goods were intended for local consumption or whether they were destined ultimately for the enemy.<sup>2</sup> But against this rule the Secretary of State of the United States protested and asserted that the evidence should be limited to "proofs obtained at the time of seizure" and before the vessel was taken in. As a result of the new British rule "innocent vessels or cargoes were being seized on mere suspicion while efforts were being made to obtain evidence from extraneous sources to justify the detention, and the commencement of prize proceedings."<sup>3</sup> The rule as to the admission of extrinsic evidence was, as the British government admitted, an innovation in prize court procedure. Under the conditions existing at the time the old rule originated the restriction of evidence to the ship's papers was reasonable enough, but to-day, when transactions of sale and instructions to agents are

<sup>1</sup> Compare the case of the *Haabet*, 6 *Rob.* 54, where this rule was early enunciated by the British prize court.

<sup>2</sup> See the defense by Sir Erle Richards in the article cited above, pp. 22-24.

<sup>3</sup> Note of Mr. Lansing, Oct. 21, 1915. *European War*, No. 3, pp. 27 ff.

often made by cable, telegrams or wireless messages there would seem to be no good reason why the evidence afforded by such means should not be admitted and taken into consideration in ascertaining the intent of the parties.

In the World War, as in every maritime war, the most irritating controversies between belligerents and neutrals were probably those connected with trade in contraband, and they are likely to become more irritating and more numerous in the future because of the changed conditions referred to above. In consequence, some writers have proposed that neutral governments should prohibit their nationals from engaging in such traffic<sup>1</sup> and in some wars of the past certain governments have undertaken to do so.<sup>2</sup> A proposal, however, which has found more favor is to remove all restrictions on trade in contraband. Such a proposal was made by the British delegation at the Second Hague Conference, and it is significant of the trend of opinion that of the thirty-five States voting on the proposal, twenty-five voted for it.<sup>3</sup> Still another proposal was one made at the same conference by the American delegation for restricting the right of capture to goods absolutely contraband.<sup>4</sup> These proposals all indicate a growing feeling of dissatisfaction with the existing rules and especially those of the Declaration of London, some of which are illogical and arbitrary under modern conditions, while others are quite inadequate, as was abundantly demonstrated by the events of the World War.

Closely connected with the controversies relative to contraband trade during the World War was that to which the blockade measures of Great Britain and France gave rise.

<sup>1</sup> For example Kleen, *Contrabande de Guerre*, p. 52 ; Hautefeuille *Nations Neutres en Temps de Guerre* ; Field, *Outlines*, Sec. 964 ; and Woolsey, *International Law*, p. 320. Compare also Phillimore, *International Law*, Vol. III, Secs. 227 ff.

<sup>2</sup> See the instances mentioned in my work cited, II, 314.

<sup>3</sup> *Deux. Conf., Actes et Docs.*, III, 881. The reasons for the proposed abolition are stated by Lord Reay, *ibid*, p. 854.

<sup>4</sup> *Ibid*, p. 1160.

During the early months of the war the coasts and ports of various portions of enemy territory were blockaded by some one or other of the belligerent powers, notably the coast of German East Africa by Great Britain and France; the coast of Kiau-Chou, by Japan; a certain part of the coast of Asia Minor and Syria by France; the coast of Bulgaria by Great Britain and France; etc. These blockades were all proclaimed and notified in accordance with the established rules governing blockade and they gave rise to no controversy with neutral governments; partly for the reason that they were admitted to be legitimate belligerent measures and partly because of the commercial unimportance of the countries blockaded.

During the first half year of the war the allied powers made no attempt to blockade Germany. In consequence, however, of the German war zone decree of February 4, 1915, which was regarded by the allied powers as "entirely outside the scope of international law" and contrary to the humane and established rules of maritime warfare, the government of Great Britain announced in March the intention of the allied governments "to seize all ships carrying goods of presumed enemy destination, ownership or origin." In explanation of the intended measure it was said that the Allies had been driven to adopt it as an act of retaliation against Germany for her illegal decree referred to above. It was added that the measure would be enforced without risk to neutral ships or to neutral or non-combatant life and that it was not intended to confiscate such vessels and cargoes as would be seized unless they were otherwise liable to condemnation.<sup>1</sup> By an order in council of March 11, 1915, the announcement was put into effect. Again the measure was defended as the exercise of a legitimate right of retaliation against an enemy which had repudiated the established rules of maritime warfare. All ships and their cargoes proceeding to or from a German

<sup>1</sup> Text in *European War*, No. 1, pp. 61 ff.

port would be seized and placed in the custody of a prize court. But, differing from the usual procedure in blockade operations, the goods, if non-contraband and if not requisitioned, would be restored to their owners or claimants under such conditions as the prize court might deem just. The measure therefore would be more favorable to neutrals than the usual type of blockade under which non-contraband goods destined to a blockaded port were liable to confiscation equally with contraband goods. But the order in council also provided in effect that ships destined to neutral ports if carrying goods with an enemy destination might be required to be discharged in a British port and placed in the custody of the prize court and disposed of in a similar manner to those destined directly to a German port.<sup>1</sup> The word "blockade" was not mentioned either in the announcement of March 1 or in the order in council of March 11, nor was the latter in the usual form of a blockade proclamation, defining the area blockaded or laying down any rules concerning the enforcement of the measure. From the outset, however, British officials admitted that the measure was intended to be a blockade in fact and Sir Edward Grey so announced on March 13, adding that the "British fleet has instituted a blockade, effectively controlling by cruiser cordon all passage to and from Germany by sea."

Against this somewhat novel measure which was declared to be a blockade but which did not mention the word and which possessed none of the external forms of customary blockade proclamations, the neutral governments of the United States, Denmark, the Netherlands, Norway and Sweden vigorously protested. The Government of the United States in a succession of notes characterized the measure as a "so-called blockade" which constituted practically an assertion of unlimited belligerent rights over neutral commerce: it did not distinguish

<sup>1</sup> Text, *ibid*, pp. 65 ff. On March 13 the French government issued a decree to the same effect. Text, *ibid*, p. 67.

between neutral and enemy commerce ; it amounted to a virtual blockade of the ports of neutral countries adjacent to Germany ; and it was illegal because it was not effective and because it did not apply impartially to the ships of all neutral powers, since German ports on the Baltic had not been blockaded and therefore remained open to the traffic of ships of Denmark, Norway and Sweden.<sup>1</sup> For these and other reasons the government of the United States could not recognize the order in council as a legal blockade measure. It was "admittedly retaliatory, and therefore, illegal in conception and in nature, and intended to punish the enemies of Great Britain for alleged illegalities on their part."<sup>2</sup>

Regarding the objection as to the form and retaliatory character of the order in council, the British Government replied, in substance, that the non-conformity of the order to the customary rules governing blockade was merely technical and not in contravention of their spirit ; that it was the equity of the allied case rather than the technical adherence to the law which interested the general public ; that to insist on strict conformity to technical requirements of the law in dealing with an enemy which openly disregarded the law was to apply technical standards where they were hardly applicable ; and that to hold one belligerent to the strict observance of the law when the enemy refuses to conform to it is to load the dice in favor of the unscrupulous.<sup>3</sup> The allies were therefore within their rights and it was their duty "to take every step in their power" to meet the measures of an enemy which had so shockingly violated the recognized usages of civilized warfare. As to the complaint of the United States that the

<sup>1</sup> See especially the American Note of March 30, 1915, *European War*, No. 1, pp. 69 ff., and of October 21, 1915, *ibid*, No. 3, pp. 25 ff. Also Mr. Lansing's memorandum of April, 1916, *ibid*, pp. 77 ff.

<sup>2</sup> Note of October 21, 1915.

<sup>3</sup> These arguments were developed by Mr. Balfour in an article published in the *London Times* of April 2, 1915.



blockade was directed against neutral as well as enemy ports, Sir Edward Grey stated that the British government could not admit what was understood to be the American contention that "if a belligerent is so circumstanced that his commerce can pass through adjacent neutral ports as easily as through ports in his own territory, his opponent has no right to interfere and must restrict his measures of blockade in such a manner as to leave such avenues of commerce still open to his adversary." Such a contention could not be maintained upon principles of international law or equity. Belligerents had an undoubted right by means of an effective blockade to cut off the enemy's trade with foreign countries and if the enemy was so circumstanced that his trade could be carried on through the medium of adjacent neutral ports a belligerent violated no fundamental principle of international law when he applied the blockade in such a way as to cut off such commerce, if there were no other means of doing it. In short, if neutrals could be lawfully prevented from trading directly with a blockaded port they might equally be prevented from trading with it indirectly through neutral ports situated in close proximity to the blockaded country. This was not blockading the neutral port; it was merely applying old principles to the peculiar circumstances of the situation. The American government finding itself confronted by a similar situation during the Civil War had extended the doctrine of continuous voyage and the principles of blockade to enable it to deal with that situation and the British government had refrained from formally protesting against the policy adopted by the American government. The situation confronting Great Britain was, briefly stated, this :

' Adjacent to Germany are various neutral countries which afford her convenient opportunities for carrying on her trade with foreign countries. Her own territories are covered by a network of railways and waterways which enable her commerce to pass as conveniently through ports in such neutral countries as through her own. A blockade limited to enemy ports would

leave open routes by which every kind of German commerce could pass almost as easily as through the ports in her own territory. Rotterdam is indeed the nearest outlet for some of the industrial districts of Germany."

As to the complaint of the American government that the blockade of Germany was not effective, and therefore under the recognized rules governing blockade, not legal, Sir Edward Grey readily admitted that the blockade was not of the "close cordon" character such as those maintained in former wars, but it could hardly be admitted that, in view of the introduction of the submarine, the mine and the airship, the old requirement of a cruiser cordon in the immediate offing of the blockaded port was still essential. This, in fact, the American government had readily admitted in its note of March 30, 1915. In short the "long range" blockade under which the blockading vessels would be permitted to remain sufficiently far out to be beyond the range of enemy mines and torpedo boats would now have to be recognized as a legal blockade. In fact the British blockade was quite as effective as that maintained by the United States during the Civil War; indeed commerce with Germany had been more effectively cut off than ever commerce with the Southern Confederacy had been.

As to the American criticism that the blockade was illegal because it was not impartially applied against the commerce of all neutrals alike since the Baltic ports of Germany had been left open to trade with the Scandinavian ports, Sir Edward admitted that in the beginning, at least, no attempt had been made to blockade those ports by sending cruisers there for the purpose, because owing to the presence of German mines and submarines in the Baltic it would have been dangerous or impossible to do so. But the failure of the British government to blockade these ports resulted from a geographical situation and not from any intention to discriminate in favor of the Scandinavian ports as against those of America. The rule as to impartiality of treatment had reference to arbitrary and

intentional discrimination and did not impose on belligerents exercising the right of blockade an obligation to blockade all the coast line or all the ports of the enemy. They might, as President Lincoln did during the Civil War and as President McKinley did during the war with Spain, blockade certain portions of the enemy's coast and extend or contract the blockaded area in their discretion.<sup>1</sup>

Such, briefly stated, was the substance of the British defense. It must be admitted that the policy adopted by the British government involved an extension of the principles of blockade as they had been generally recognized in the past. The argument based on American practice during the Civil War was not entirely well-founded for in fact the Supreme Court in the *Paterhof* case <sup>2</sup> had refused to extend the rule of continuous voyage to blockading operations by condemning goods shipped from England to the neutral port of Matamoras situated near the confederate frontier—a voyage which was exactly parallel to a voyage from America to a Dutch or Danish port during the World War. During the Civil War, vessels destined to the neutral ports in Cuba, the Bahamas and the Bermuda islands were condemned when it was shown that their ultimate destinations were blockaded ports in the Confederacy, but in these cases both laps of the voyage were by sea whereas during the World War the second part of the voyage (that between the intermediate neutral port and the blockaded territory) was overland. According to some writers this difference is important and they deny the right of a belligerent to interfere with commerce when the final lap of the voyage is by land, canal or river transportation.<sup>3</sup> But, as Sir Edward Grey pointed out, this distinction hardly seems reasonable under

<sup>1</sup> See especially Sir Edward Grey's note of July 24, 1915, *European War*, No. 2, pp. 179 ff., and his note of Apr. 24, 1916, *ibid*, No. 3, pp. 64 ff.

<sup>2</sup> 5 Wall. 28 (1866).

<sup>3</sup> Compare Holtzoff in 10 *Amer. Jour.*, pp. 53 ff., and Perrinjaquet, in the *Rev. Gén.*, 1915, pp. 225 ff.

modern conditions, and, if the right of a belligerent to intercept commerce on its way to or from an enemy country, even through a neutral port, be granted, it is difficult to see why the interposition of a few miles of sea as well should make any difference. In extending the doctrine of continuous voyage or ultimate destination to blockade operations, Great Britain clearly disregarded the Declaration of London which expressly denies such a right and allows it only in respect to the transportation of contraband. In fact, however, contraband and blockade measures are so closely connected that it is difficult to separate them and it has been argued that the rule which allows the application of the doctrine of continuous voyage in the one case but forbids it in the other is not founded on any practical or sound distinction.<sup>1</sup> Regarding the equities of the case it would seem that the right of a belligerent to prevent, by means of a blockade, commerce with the enemy must be interpreted to allow him to intercept such trade through neutral ports situated in close proximity to the enemy's territory, otherwise the right will be of little value when the enemy is surrounded wholly or in part by neutral states as Germany was during the world war. But in such a case the belligerent has no right to interfere with the transportation of goods intended for use or consumption in the neutral country to which they are consigned. Under the most favorable interpretation of his right he can intercept only those goods which have an ultimate enemy destination. But how can he distinguish between commerce of the one and the other kind? There lies the difficulty. Any test for determining between legitimate neutral trade on the one hand and that which may ultimately reach the enemy, on the other, is likely to be arbitrary and result in unjust interferences with *bona fide* neutral commerce. This task of sifting out and intercepting enemy commerce while leaving unmolested legitimate

<sup>1</sup> Compare Sir John MacDonell in I *Grotius Soc., Probs. of the War*, p. 93.

trade with the neighboring neutral countries of Germany during the world war greatly embarrassed the British government and the measures which it adopted evoked vigorous protests from neutrals affected.<sup>1</sup> Of the several expedients employed, the most important was the so-called system of "rationing" by which European neutrals adjacent to Germany were allowed to import a quantity of goods equal to the amount of their pre-war importations. Goods in excess of this amount were assumed to be intended for re-exportation to Germany and they were not allowed to pass the blockade. So far as such trade was concerned the measures adopted to prevent it constituted therefore a blockade of the neutral ports to which the goods were consigned. There was much complaint that the enforcement of this policy was arbitrary and did not take into consideration the actual needs of the neutral countries adjacent to Germany, whose continental sources of supply had been cut off by the war. In consequence, their industries were alleged to have been paralyzed and their populations reduced, in some cases, to actual want. The United States government which had vigorously protested against the blockade while it was neutral, when it became a belligerent, promptly lent its co-operation to the allies by forbidding the exportation to neutral countries in Europe, except upon licenses which were sparingly granted, of all goods which might ultimately find their way to the enemy, and which might be of military value to him. As the larger proportion of the imports of these countries came from the United States, the British and French governments were relieved by this prohibition from the further task of shifting out goods which were intended for the enemy.

Altogether the lot of neutrals during the World War was a hard and trying one. As already stated, the merchant marines of some of them were nearly destroyed by the German submarine war against neutral commerce. Neutral vessels were virtually

<sup>1</sup> See details in my work cited, II, 342 ff.

excluded from navigating vast areas of the high seas or they were compelled to traverse devious and circuitous routes prescribed by belligerents and in which they were exposed to destruction by mines or submarines. They were seized and taken into distant ports on suspicion for the purpose of search, their mails were removed and detained or confiscated and the ships themselves were detained for long periods of time at the expense of the owners, often involving ruinous losses, even when the trade in which they were employed was innocent. The burden of proof as to the innocence of their voyages was shifted from the captor to the owners or consignees and new presumptions of guilt were introduced and applied. Practically all merchandise was treated as contraband so that innocent trade with belligerents was reduced to insignificant proportions. And finally, the rules of blockade were extended and enforced by measures which were regarded as arbitrary and the effect of which was almost to put an end to trade between certain neutrals themselves. The right of a belligerent to retaliate against his enemy for violation of the law was even interpreted to include the right of retaliation against neutrals.<sup>1</sup>

<sup>1</sup> See the case of the *Jeonora* in which the Judicial Committee of the Privy Council in 1918, affirming the decision of the prize court, held in effect that a belligerent in the exercise of his right of retaliation against the enemy may overstep the limits of international law and retaliate against neutral commerce if the enemy has infringed upon neutral rights to the injury of the other belligerent by illegal measures; in short, such an enemy may be punished "through the sides of a neutral." *Brit. and Col. Prize Cases*, 3, 385. See also the case of the *Stigstad* (*ibid.*, pp. 181 and 348) where the Judicial Committee, affirming a decision of the prize court, upheld the right of reprisal against the enemy even when it caused delays or inconveniences to neutrals. The general basis of this doctrine was that neutrals could not justly complain of such injuries, because they failed to prevent Germany from carrying out her illegal measures. Compare 2 Oppenheim (3d ed.), p. 427, and Pyke, *Law of Contraband*, p. 4. Sir Erle Richards even affirms that British prize courts were bound to adopt this view since the matter had already been settled by the British Lords of Appeal during the Napoleonic Wars. He defends the right thus asserted on the ground that the neutral has no right of complaint against any but the original offender, for the

Many other questions involving the interpretation and application of the law governing the relations between belligerents and neutrals arose during the war but for want of time and space they cannot be considered in detail here. The right of neutral governments to permit the exportation of arms and munitions from their territories for the benefit of the belligerents on one side when those on the other were unable to avail of the benefit in consequence of a blockade, was attacked by both the German and Austro-Hungarian governments which addressed protests to the government of the United States, whose territory had become the chief source of supply for their enemies. During former wars the German and Austrian governments had allowed without restriction their nationals to sell and export arms and munitions to any and all belligerents and in some wars they had done so on a large scale. Their jurists had practically without exception upheld the legality of the practice. They maintained however, that the situation during the World War was largely different from that of all previous wars, so that the argument from past practice was not conclusive. The belligerents on one side only were the beneficiaries of this traffic; in consequence of the large demand on the part of those belligerents a vast industry for the manufacture and exportation of war supplies had suddenly sprung into existence in the United States. The country had thus become a veritable arsenal for the supply of Germany's enemies and the assistance which was thus being rendered to the belligerents

other belligerent has a right under international law to retaliate. Furthermore, no belligerent can be compelled to fight at a disadvantage; if one belligerent violates the law it belongs to the other belligerent to do likewise as a reprisal. He admits, however, that such a right enables belligerents "to override the whole of the protection which the common law of nations and treaties have given to neutral trade." See his article in the *Brit. Year Book of Int. Law.* (1920-21), pp. 30 ff.

This doctrine has been much criticized by jurists. See Baty, in *Penn. Law Rev.*, June, 1915, p. 717; Yntema, 17 *Mich. Law Rev.*, pp. 64 ff.; Borchard, *Yale Law Jour.*, 1919, pp. 583 ff., and Hyde, *op. cit.*, II, 665.

on one side was inconsistent with the spirit, at least, of genuine neutrality ; therefore the inequality of treatment which Germany and her allies were in fact receiving should be removed by the imposition of an embargo on the exportation from the United States of arms and munitions to all belligerents. There was, it must be admitted, considerable sentiment in the United States in favor of such an embargo not only because the enormous proportions which the traffic had assumed had made the United States in some measure an ally of Great Britain and France, but because it was felt to be condemnable upon general grounds of international morality and public policy. It was argued, furthermore, that the rule which permits the nationals of a neutral power to engage in such traffic but which at the same time forbids their government to sell arms or munitions to a belligerent was based upon a distinction which had no sound basis. It was in effect the maintenance of a double standard of morality. In a democracy where the government is supposed to be merely the agent of the people it was illogical to forbid the one from engaging in such traffic but to allow the other to do so.

The American government, however, declined to interfere with the trade against which Germany and Austria protested. Such commerce had always been recognized as lawful and only in rare instances had any neutral government ever forbidden it. All belligerents alike were free to avail of the American market and if as a result of the fortunes of the war some were prevented from doing so that did not oblige neutrals, legally or morally, to equalize the advantages by prohibiting trade with all. Having at the outset proclaimed its markets to be open to all alike it might even be a violation of neutrality to close them subsequently to the belligerent which had succeeded in isolating its enemy and cutting off his oversea commerce. The distinction which the Germans attempted to draw between exportations on a large scale and exportation in small quantities was not practicable nor was that between



the output of newly created industries and those which were already in existence at the outbreak of the war. Finally, there were practical difficulties in the way of the enforcement of prohibitory measures of this kind and even if there were none, considerations of public policy made it inadvisable.<sup>1</sup> The position of the American government was entirely in conformity with the general practice of the past, the opinion of the text writers and the rules of the Hague Convention<sup>2</sup> although it must be admitted that a good deal might be said against the morality of the practice especially during a war when a single country becomes the chief source of supply for the belligerents on one side, and from which those on the other side are completely cut off.<sup>3</sup>

The old question of the extent of the privileges which should be allowed belligerent war vessels in neutral ports proved an embarrassing one for many neutral governments during the World War. Charges and counter-charges were frequently made by belligerents on one side that the war vessels of those on the other were allowed in some cases to procure supplies in neutral ports, to make repairs and to remain longer than the law of nations allowed. Neutrals themselves often had occasion to complain at the conduct of belligerent vessels in taking on supplies of coal in their ports, ostensibly for the purpose of returning to their own home ports but in reality for continuing their naval operations at sea. The Hague Convention allows belligerent warships to take on a sufficient supply of fuel in neutral ports to enable them to reach the nearest port in their own country<sup>4</sup> and most neutral governments during the late

<sup>1</sup> I have discussed the question in detail in my work cited, Vol. II, Ch. 35, where the literature and sources of information are cited.

<sup>2</sup> Art. 7, Hague Convs., Nos. V and XIII of 1907.

<sup>3</sup> Compare Butte, *Procs. Amer. Soc. of Int. Law*, 1915, p. 129; Burgess, *The European War*, Ch. VII, and other references in my *Int. Law and the World War*, II, 399.

<sup>4</sup> Art. 19 of the 13th Conv. of 1907.

war issued proclamations embodying this rule.<sup>1</sup> But it was found that in the case of neutral countries, such as those of South America, situated far distant from the European theater of hostilities, this rule was inadequate, since the warships of both Great Britain and Germany were able to procure supplies of coal in the ports of Chile sufficient to take them to their own distant home ports, and after cruising for weeks in the waters of the Southern Atlantic or Pacific and engaging in naval operations, could return and obtain fresh supplies without ever returning to their own ports. This practice virtually made the neutral ports from which such supplies were obtained bases of naval operations which the Chilean authorities very properly considered to be in violation of the spirit if not the letter of the Hague Convention. Accordingly, by a decree of Dec. 15, 1914, the government of Chile limited the supply of coal which might thus be procured in its ports, to an amount which would be sufficient to enable them to reach the nearest port of a *neighboring neutral country* having a coal depot. It was found that merchant vessels of both German and British nationality procured large supplies of coal from such ports on the pretext of returning to their home ports but which in fact were delivered to warships of their own country in the vicinity. The restrictions of the Hague Convention applied only to warships but the Chilean government, considering that there was no substantial reason for making a distinction between the two classes of vessels, proceeded to place limitations on the amount of coal which merchant vessels might procure in its ports except where guarantees were given that the coal was intended for voyages to European ports. Against this policy the British government protested but the Chilean government refused to rescind its order.<sup>2</sup> The

<sup>1</sup> These proclamations may be found in *Naval War College, Int. Law Topics*, for 1916.

<sup>2</sup> Decree of Dec. 15, 1914, *Int. Law Topics*, 1916, p. 22. See also Alvarez, *La Grande Guerre Européenne et la Neutralité du Chili*, Ch. V, also 23 *Rev. Gén.*, Docs., pp. 7 ff.

government of Uruguay adopted the same policy as Chile in regard to the coaling of both belligerent warships and merchant vessels in its ports.<sup>1</sup> The government of Venezuela did likewise in regard to warships but not merchant vessels. The action of these powers therefore constituted an innovation upon the existing practice<sup>2</sup> but it was entirely in accord with the requirements of genuine and strict neutrality. The Brazilian, Cuban, Dutch and some other governments, while not going to this length, forbade belligerent warships from renewing their fuel supplies in their ports oftener than once every three months.<sup>3</sup>

Most neutral governments admitted belligerent warships to their ports but limited their stay to 24 hours except in case of stress of weather, lack of provisions or unseaworthiness necessitating repairs.<sup>4</sup> China and Denmark, however, restricted the number belonging to any one belligerent which might avail of this privilege in the same port, to three and Uruguay limited the number to twelve. Most of them prescribed an interval of 24 hours between the successive departures of two war vessels belonging to different nationalities. Several neutral powers, notably the Netherlands, Norway, and Sweden went to the length of excluding belligerent war vessels including submarines from entering their ports except in case of emergency; Denmark

<sup>1</sup> Decrees of Dec. 14, and Dec. 15, 1914. Texts in *Int. Law Topics*, 1916, pp. 115, 118.

<sup>2</sup> Fauchille, *op. cit.*, p. 715.

<sup>3</sup> Brazilian Rules of Neutrality of Aug. 4, 1914, Art. 15. *Int. Law Topics*, 1916, p. 12. Cuban Decree of Aug. 10, 1914, *ibid*, p. 48; Dutch Decl. of Neutrality, *ibid*, 63.

<sup>4</sup> Uruguay at first allowed a period of *séjour* of 72 hours but later reduced it to 24 hours. In the controversy between Germany and Chile regarding the action of the *Dresden* in remaining in Chilean waters longer than 24 hours and for refusing to obey an order to intern, the German government denied that the 24-hour rule was a rule of international law among other reasons because Germany had reserved her ratification of the article of the Hague Convention prescribing it. Alvarez, *op. cit.*, p. 232.

excluded them from the port of Copenhagen and certain of her territorial waters which were mined or otherwise defended; and Spain appears to have excluded submarines but not other war vessels from hers.<sup>1</sup> The government of the Netherlands, as has already been pointed out, allowed armed merchantmen of belligerent nationality to enter and stay subject to the same restrictions as apply to warships. In short they were assimilated to the status of warships so far as their admission to Dutch ports was concerned. The policy of excluding warships from neutral ports was not entirely unprecedented but it was contrary to the general practice. There is however, a growing opinion in favor of it and the events of the World War have probably strengthened it.<sup>2</sup>

The question as to the treatment which commercial submarines of belligerent nationality are entitled to receive in neutral ports was raised by the visit in July, 1916, of the German commercial submarine, *Deutschland*, to a port of the United States, then neutral. The American authorities accorded it the usual privileges allowed to merchant vessels, this, on the ground that it was engaged in a purely commercial undertaking, carried no armament, and was not capable of conversion into a war vessel. The Dutch and Swedish governments appear to have adopted the same policy in regard to commercial submarines.<sup>3</sup>

The British and French governments did not formally protest against this policy, but in their memorandum referred to above,

<sup>1</sup> Compare Fauchille, *op. cit.*, p. 722. In August, 1916, the British and French governments addressed an appeal to various neutral governments urging them to close their ports to submarines of belligerent nationality, on the ground that by reason of their ability to escape control and observation and the impossibility of verifying their nationality they were not entitled to the benefit of the rules regarding the admission of surface navigating war vessels to neutral ports. Text in *N. Y. Times*, Oct. 10, 1916.

<sup>2</sup> Compare Perrinjaquet in 24 *Rev. Gén.*, p. 230.

<sup>3</sup> Compare Fauchille, *op. cit.*, p. 722.

they appealed to neutral governments to close their ports to all submarines whatever the purpose to which they were put, and in their protest against the Swedish ordinance excluding war submarines from its ports they complained that it had made a distinction between war and commercial submarines—a distinction, which, they argued, was not justified, because of the difficulty of distinguishing between the two types of craft, and of controlling their action in neutral waters. Both should therefore be treated as war vessels, but in view of the latter considerations they should be excluded from the privileges allowed to surface-navigating warships. This view, however, hardly appears to be justified, although neutrals might very properly insist that submarines availing of the privileges of entry should refrain from navigating below the surface.<sup>1</sup> The government of Norway in fact adopted this policy. By a decree of Oct. 13, 1916, it admitted commercial submarines to its ports and waters only on the condition that they navigated by day, in fair weather and upon the surface.

In most of the proclamations and rules of neutrality issued during the World War belligerent warships in neutral ports were, in accordance with the 13th Hague Convention of 1907, allowed to make the necessary repairs to render them seaworthy<sup>2</sup> provided their fighting strength was not thereby augmented. But in all such cases they were required to depart within 24 hours after the completion of the repairs. Following the practice

<sup>1</sup> Compare Reeves in 11 *Amer. Jour.*, p. 149. Judge Atherley Jones, an English writer, in an address before the Grotius Society on March 20, 1917, maintained that the attempt to distinguish between war and commercial submarines was "from the belligerents' point of view wholly impracticable" because of the impossibility of verifying their nationality or of determining the character of their service, in consequence of their ability to submerge. As to the *Deutschland*, it was, he argued, in fact a public vessel and its voyage was in the interest of the German government. It should therefore have been treated as a war vessel. *Grotius Soc., Probs. of the War*, Vol. III, p. 40.

<sup>2</sup> Fauchille, *op. cit.*, p. 722.

of the Russo-Japanese war neutrals generally adopted the policy of interning those which were unable to complete their repairs within the time prescribed by the port authorities or the government; as well as those whose injuries were so serious that permission to repair them was considered to be contrary to the duties of strict neutrality. In accordance with this rule a considerable number of German war vessels were interned in various neutral ports particularly those of the United States and their officers and crews were generally released on parole.<sup>1</sup>

Finally, most of the declarations of neutrality expressly allowed naval prizes to be brought into their ports but they limited the privilege to cases of unseaworthiness, stress of weather, lack of fuel or provisions, and the like, and all required that they should depart as soon as the causes which justified their entry should have ceased to exist. This is the rule laid down by the Hague Convention No. XII. But Article 23 of the Convention allows neutrals to permit the bringing of prizes into their ports for the purpose of sequestration pending the decision of the prize court. The American government, however, considering that such permission was not in accordance with the spirit of genuine neutrality declined to ratify this article. During the World War the Brazilian and Uruguayan governments appear to have been the only neutral governments which in their neutrality regulations expressly authorized the bringing of prizes

<sup>1</sup> The Hague Convention in authorizing repairs sufficient to make the vessel seaworthy contains no restriction as the cause of the injury. Suppose the damage has resulted from a naval engagement? In that case may the neutral permit the damage to be repaired in his port? The Hague Convention does not forbid it. The neutral is therefore free to permit it in his discretion. It may be doubted, however, whether the granting of such permission is in harmony with the obligations of genuine neutrality.

<sup>2</sup> The instances and details are given in my work cited above, vol. II, pp. 423 ff. See also Fauchille, *op. cit.*, Sec. 1488, and Hyde, *op. cit.*, vcl. II, Secs. 860 and 864. See also *European War*, No. 2, pp. 49 ff., 126, 129, and 139 ff.

into their ports for such a purpose.<sup>1</sup> Several cases occurred during the World War which involved controversies in regard to the matter. One such case was the bringing into a Chilean port by the German cruiser *Prinz Eitel Friedrich* of the French steamer *Jean* and holding it there for a period of eight days in violation of the neutrality regulations of Chile as well as of the Hague Convention. Other German prizes were taken into Chilean port and held in violation of the neutrality regulations, against all of which the government of Chile protested.<sup>2</sup> The most famous case of the kind was that of the *Appam*, a British merchantman brought into Newport News, Virginia, by a German "raider" in February, 1916. The vessel having been libelled by the original owners in the United States district court, the German ambassador protested against the assumption by the court of jurisdiction over the prize, on the ground that under the old Prussian-American treaty of 1799 German captors had a right to bring their prizes into American ports and to detain them there. As to the contention of the British ambassador that the case was governed not by the above mentioned treaty but by Art. 21 of the 13th Hague Convention which limits the right of bringing in prizes to cases of unseaworthiness, stress of weather etc., the German ambassador argued that Great Britain having refused to ratify the Convention could not invoke its benefits. The district court, however, held, and its decision was affirmed by the United States supreme court, that the case was governed by the Hague Convention of 1907, that the rules there laid down were merely declaratory of the existing law of nations and as such they were binding, notwithstanding the failure of the British government to ratify the Convention—particularly in view of the fact that some 43 other powers including

<sup>1</sup> Brazilian rules, Aug. 4, 1914, Art. 21; Uruguayan rules of Aug. 7, 1914, Art. 11. *Int. Law Topics*, 1916, pp. 13, 108. Compare Fauchille p. 735.

<sup>2</sup> See Alvarez, *op. cit.*, Ch. 9, for the details.

both Germany and the United States had ratified it. The Court added that it was now the generally accepted practice among enlightened nations that their ports could not be used as places of asylum or permanent rendezvous for the prizes of belligerents.<sup>1</sup> The decision was in accord with the Hague Convention and with the spirit of neutrality as it is generally understood to-day and it has been generally approved by jurists and writers on international law.

The government of the Netherlands adopted a similar view of neutral duty in refusing to allow German merchant vessels which had been seized by the Belgian authorities in the port of Antwerp at the outbreak of the war to pass through the Scheldt on their way to England. Later when these vessels had been retaken by the Germans who wished to take them through the Scheldt, the permission was likewise refused.<sup>2</sup> The Dutch government also refused to permit ships of one belligerent which had been requisitioned by another to enter its ports, as well as those which had been requisitioned by a neutral government, when the act or requisition had been the cause of its entry into the war (for example, the German ships requisitioned by Portugal in February, 1916, which led to Germany's declaration of war against Portugal).<sup>3</sup> This represented a very strict view of neutral duty and contrasted somewhat with the act of the Dutch government

<sup>1</sup> The Steamship *Appam*, 234 U. S., x 24. The correspondence between the Secretary of State and the British and German ambassadors relative to the *Appam* may be found in *European War*, No. 3, pp. 331 ff. Discussions of the case may be found in Hyde, *op. cit.*, Vol. II, Sec. 862, in my work cited above, Vol. II, sec. 566. Coudert in 11 *Amer. Jour.*, pp. 302 ff., and Allin, *Minn. Law Rev.*, Jan. 1917; Bellot, *Grot. Soc. Pubs.*, II, 11 ff.; Fauchille, *op. cit.* pp. 735-36; Scott in *Amer. Jour.*, 1917, p. 270; and Basdevant in 24 *Rev. de Droit Int.*, pp. 109 and 451.

<sup>2</sup> Steamers for river navigations contradistinguished from ocean-going steamers such as those mentioned above were, however, permitted to enter and pass through Dutch territory. See the Dutch Orange Book, *Min. des Affs. Etrangères, Rec. de Diverses Coms.*, etc., pp. 170 ff. Permission was also granted to the British hospital ship, *China*, to pass through the Scheldt subject to certain conditions.

<sup>3</sup> Fauchille, *op. cit.*, p. 736.



in permitting the transit through its territory of sand and gravel from Germany to Belgium then under German occupation. The British government protested on the ground that these materials were being used by the Germans for the construction of military roads and defenses in Belgium. The Dutch government, on its part, however, maintained that it had adopted all possible measures to restrict the transit to such materials as were used by the Germans only for non-military purposes, such as the construction and repair of highways, canal embankments and the like.<sup>1</sup> But it was manifestly difficult to distinguish between those which were intended for the one purpose and those which were used for the other. An instance of a more extreme conception of neutral duty was afforded by the government of the United States in refusing to allow wounded and disabled Canadian soldiers who had been discharged, from passing through the State of Maine as individuals, on their way from Europe to their homes in Canada.<sup>2</sup>

Such were some of the more important questions of neutrality raised during the World War and such were the interpretations of neutral rights and duties. There were a host of others which for lack of space cannot be considered here. On the whole, it may be said that with rare exceptions, neutrals made an earnest endeavour to observe strictly their obligations as they are defined by the international conventions and the established usages. So anxious were they to avoid all excuse for violations of their own neutrality by one belligerent as measures

<sup>1</sup> The correspondence between the British and Dutch governments regarding the matter may be found in the Dutch Orange Book, *Doorvoer Door Nederland uit Duitschland Naar Belge, en Omgekeerde Richting* (the Hague, 1917). See also a British White paper, *Misc. No. 17* (1917), Cd. 8693; 10 *Amer. Jour., Supp.*, pp. 175 ff.; and an article by De Visscher in the *Rev. Gén.*, 1919, pp. 142 ff.

<sup>2</sup> See the correspondence between the American and British Governments regarding the matter, in the *Amer. Jour.*, Oct. 1917, *Supp.* pp. 231-232.

of reprisal against the others that some of them went even beyond the requirements of the existing law in forbidding acts which had never been considered as inconsistent with the duties of neutrality. This was notably the case with the Netherlands and Switzerland, both of whose geographical situations exposed them to the danger of having their neutrality disregarded by the belligerents on both sides. The neutrality of some of the Latin American states, particularly Chile, was likewise difficult to maintain owing to the facilities which their ports afforded the war ships of the contending belligerents for obtaining fuel and other supplies and the temptation which they offered naval commanders to abuse their privileges in such ports. It can be said that there was little in the conduct of neutrals themselves during the world war that deserves reproach. It was rather the policy of belligerents in their treatment of them that was most often condemnable. Some of them indeed showed little disposition to respect the rights of neutrals. The territories of Belgium, Luxembourg, China, and Greece were invaded or occupied by one or another of the belligerents. In the case of Belgium and Luxembourg there was no excuse save the military convenience and strategical interest of the invading belligerent and in the case of the violation of Chinese territory by Japan the justification was largely the same. Neutral countries in Europe were compelled to place embargoes on the exportation to belligerent territory of such articles as the powers blockading Germany saw fit to prescribe, otherwise the importation into their own countries from over the seas of such goods would not be allowed to pass the blockade. As stated above, neutral vessels were destroyed on a large scale, others were requisitioned by belligerents as they were needed for their own purposes, and by means of the blockade and contraband measures described above neutral commerce was reduced to insignificant proportions and in some cases the industries of neutral countries were thereby paralyzed and the inhabitants deprived of sorely needed supplies. All in all, their lot was as

has been said a hard one; in some cases, indeed it was hardly more favorable than that of the belligerents themselves. Aside from the losses which they sustained through the measures adopted against their commerce and the distress which their inhabitants suffered from the isolation to which they were reduced by the belligerents, those of Europe, in particular, were put to enormous expense by the necessity of keeping their armies mobilized and of taking other measures necessary to protect their neutrality. If this is to be the lot of neutrals in future wars the question is likely to arise whether the advantages of neutrality really outweigh the disadvantages and whether states which have no direct concern in the causes and issues of a war between other powers may more effectively safeguard their interests by remaining aloof than by becoming belligerents on the one side or the other. Under such circumstances neutrality may tend to become the exception and belligerency the normal status.

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## LECTURE IX

### **The Treaties of Peace (1919) and International Law.**

The primary task of the peace conference which assembled at the close of the World War was to formulate the terms and conditions upon which the victors were willing to conclude peace with their vanquished adversaries. It was concerned, in the main, with questions of policy rather than of international law and was not therefore a "law making" conference in the sense of the Hague and other like assemblies. Nevertheless, many of the stipulations of the treaties fall within the category of what Oppenheim calls "law making" treaties. This is notably true of the so-called Covenant of the League of Nations which constitutes an integral part of each of the five treaties. In this lecture I purpose to discuss the provisions of the Covenant only in so far as they seem to supplement and modify the pre-existing rules or principles of international law.<sup>1</sup>

It may be remarked at the outset that the preamble of the Covenant emphasizes the importance of a system of law and justice as the essential basis of international organization and co-operation. The general purposes of the League, we are told, are "to promote international co-operation and to achieve international peace and security" and among the means by which these objects may be accomplished are the assumption of obligations not to resort to war except under certain conditions, the maintenance of justice, scrupulous respect for treaty obligations and the "firm establishment of the understandings of international

<sup>1</sup> The organization and nature of the League is discussed in Lecture XII; its functions in respect to the settlement of international disputes are discussed in Lecture XI.

law as the actual rule of conduct among governments.”<sup>1</sup> It may be said that the Covenant does not modify or supplement the existing rules of international law so much as it alters certain assumptions upon which the system of international law has formerly been supposed to rest. As between the members of the League themselves the responsibility of states to respect and insure the maintenance of the law is emphasized as more fundamental than the usual deductions from the assumed right of states to exist. The Covenant rather shifts the emphasis which was formerly placed upon the rights of states and exalts their obligations and responsibilities.<sup>2</sup>

But, in addition to this general result, the Covenant expressly affirms or proceeds upon certain specific principles of international law which may be regarded as innovations in some degree upon the old ideas and practice. Thus Article XI declares that “any threat of war, whether immediately affecting any member of the League or not is hereby declared a matter of concern to the whole League and it shall take any action that may be deemed wise and effectual to safeguard the peace of nations.”

<sup>1</sup> The meaning of the term “understandings of international law” as used in the Covenant, has been the subject of some discussion. It is criticized by Professor Brown for the reason that it excludes the large body of established customary law built up by judicial interpretation and precedent and which does not, he says, fall within the domain of “understandings.” The term is therefore “utterly objectionable and reprehensible.” See his editorials in 13 *Amer. Jour.*, p. 738, and 15 *ibid.*, p. 69. Professor Wright, adopting a less critical attitude, interprets the term to embrace that portion of international law not embodied in formal principles of justice but sanctioned by general assent and dealing especially with the organization of international society. The authors of the Covenant in employing the term “understandings” were not, he says thinking of the great body of international law which lies outside the domain of mere “understanding” but rather of the engagements or undertakings which they had assumed in agreeing upon a reorganization of international society. See his illuminating article in 14 *Amer. Jour.*, pp. 565 ff.

<sup>2</sup> Compare a discriminating article by Professor Quincy Wright entitled “Effects of the League of Nations Covenant” in 13 *Amer. Pol. Sci. Review* (1919), p. 557.

Article XVI also declares resort to war by any member of the League in disregard of its covenants to be an act of war against all other members of the League. The two articles introduce a new principle in international relations. Heretofore, aggressions by one state against another in violation of international law have been regarded as wrongs which affected only the particular state against which the aggression was committed. That is to say, the violation of the law by a state was treated somewhat as torts are regarded in the civil law of a particular state, under which redress is left to the immediate sufferer. Other states than the one directly attacked were regarded as "strangers to the controversy; they were expected to adopt the attitude of indifferent spectators and to refrain even from protest, except where their own immediate rights were involved. According to the new principle whenever one state goes to war in disregard of its covenants the others are bound to treat it as a common aggressor and to apply to it the measures of restraint and coercion which the Covenant authorizes for preventing it from carrying out its aggressions. All are obliged to support mutually one another in resisting the covenant-breaking state and to allow the passage through their territories of any armed forces of the League which are co-operating to protect the covenants of the League (Art. XVI). Thus the principle of collective responsibility is reinforced by the applications of physical sanctions.<sup>1</sup> In such a case there can be no neutrals as among the members of the League; all will be participants, legally if not materially speaking, in the contest against the law-defying covenant-breaking

<sup>1</sup> Compare on this point the remarks of Professor Fenwick in 14 *Amer. Pol. Sci. Review*, pp. 482-483. Professor Fenwick speaking of the effects of the Covenant remarks that the foundations upon which an effective system of international law may be based have been defined with greater clearness than ever before and that the agreement to assume obligations for the maintenance of the general peace has introduced a new conception of international law into the world.

state.<sup>1</sup> Thus the traditional right of states to remain neutral has been replaced by the principle of collective action and of joint responsibility for the maintenance of the peace. Should the whole body of states eventually become members of the League, the status of neutrality would therefore disappear from the law of nations, except in the case of wars in which the League is not itself involved. Under Article X the so-called right of conquest would seem to be abolished as among the members of the League since it condemns "external aggression" against the territorial integrity and the political independence of all members of the League and obligates all members to "respect and preserve" the integrity and independence of each member against such aggression. Some writers have refused to admit conquest as a legal mode of acquiring title to territory<sup>2</sup> but such a view, however much may be said in favor of it on grounds of morality and justice, is not supported by practice or jurisprudence.<sup>3</sup> Many of those who have been forced to admit the right of conquest have expressed the hope that it might finally be condemned and eliminated from the law of nations.<sup>4</sup> A resolution adopted by the Pan-American Conference of 1890 declaring that "the principle of conquest shall not during the

<sup>1</sup> Compare in this connection the book of Mettetal *La Neutralité et la Société des Nations* (1920), especially, pp. 88-90. But the Supreme Council of the Allied and Associated Powers by a vote of March 3, 1920, exempted Switzerland from this obligation. She alone among the members of the League may remain neutral in wars in which the League is a party (*ibid.*, p. 109). She is, however, obliged to co-operate with them in the application of the financial and non-intercourse measures.

<sup>2</sup> They are cited by Oppenheim, *Int. Law*, Vol. I (3d ed.), p. 396, n. 1. See also Hall, *Int. Law* (3rd ed.), p. 6. "The law of nations allows every sovereign government to make war upon another sovereign state." *Instructs. for the Govt. of the U. S. Armies* (1863), article 67.

<sup>3</sup> Chief Justice Marshall declared that "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted." *Johnson v. McIntosh*, 8 Wheaton (1823), 543.

<sup>4</sup> Compare Hershey, *op. cit.*, p. 181, n. 1, and Oppenheim, *op. cit.*, sec. 238.

continuance of this treaty of arbitration be recognized as admissible under American public law,"<sup>1</sup> expressed the growing sentiment against a so-called right which has no other basis than that of force. Its condemnation by the Covenant of the League of Nations, in so far as it relates to external aggression, represents an important step in the direction of eliminating from international law such a right.

The heretofore admitted right of a state to make war upon whomsoever it pleases, for any cause which might seem to it a sufficient justification and without any obligation to have recourse to judicial or other amicable means for the settlement of its controversy, is likewise condemned by the Covenant. The seal of outlawry has been placed not only upon wars of conquest, but also upon wars for the settlement of controversies which the parties recognize to be suitable for arbitration (Art. XV), for in no case can war be declared until the parties have submitted their dispute to arbitration or inquiry by the Council of the League and then only after a delay ranging from three to nine months.

Such are the more important modifications of international law which are made by the Covenant of the League of Nations; the adoption of the principle that an aggression committed by one state against another is an attack upon the rights of all; the introduction of the principles of collective responsibility and of physical sanctions; the abolition of the right of conquest; and a limitation of the right to make war.<sup>2</sup> All of them,

<sup>1</sup> Moore, *Digest*, Vol. 6, p. 402.

<sup>2</sup> Other new principles of international law or of policy which may be said to find recognition in the Covenant are:—the rejection of the doctrine of the sovereignty and equality of states; the view that the maintenance of the general peace would be promoted by a reduction of armaments; that munitions and weapons of war should not be manufactured by private enterprise; that secret treaties should not in the future be regarded as binding; that "regional understandings," such as the Monroe doctrine, for the maintenance of peace, are not condemnable;



it may be remarked, represent the formal recognition of principles toward which the more enlightened opinion of the world has been tending for some time and the culmination of clearly developing historical processes.<sup>1</sup> They are of course principles which only the members of the League of Nations have agreed to recognize and apply but since the membership of the League now embraces more than fifty states and dominions they may almost be said to constitute a part of the public law of the world.

When we turn from the Covenant to an examination of those parts of the treaties of peace which embody the terms of the settlement, in the stricter sense, we are confronted with a series of dispositions of a very different character. The covenant is in a sense the constitution of an association of states. It

that the well-being and development of backward peoples constitute a sacred trust of civilization; that the improvement of the condition of the laboring classes by means of international action would be conducive to the maintenance of the general peace and that the prevention of disease and the repression of the so-called white slave traffic as well as the traffic in opium and other dangerous drugs are matters of international concern and should be subject to international control. Compare Hicks, *The New World Order*, Ch. VIII.

<sup>1</sup> Compare Wright, art. cited, p. 564. As to the bearings of the Covenant on constitutional law see an article by Eysinga in the *Rev. de Droit Int. Pub.*, 1920, pp. 143 ff., entitled *Le Droit de la Société des Nations et les Constitutions Nationales*. Mr. Elihu Root in his criticism of the Covenant complained that it does too little for the promotion of international law. "It practically abandons," he said, "all effort to promote or maintain anything like a system of international law or a system of arbitration or of judicial settlement through which a nation can assert its legal rights in lieu of war." International law, he went on to say, is not mentioned at all, except in the preamble, no method is provided and no purpose is expressed to insist upon obedience to law, to develop the law, to press forward agreements upon its rules and recognition of its obligations, etc. See his letters of March 29, 1919, to Hon. W. H. Hays and of June 19, 1919, to Senator Lodge, 13, *Amer. Jour.*, pp. 586 and 597. This somewhat severe criticism is only justified in part. As pointed out above, the Covenant does in fact introduce a number of new principles into the law of nations and it does lay foundations for a new conception of international obligation and responsibility.

is an international statute or treaty binding upon all those which have voluntarily agreed to accept the obligations, assume the responsibilities and forego the freedom of action which membership in the association entails. But apart from the Covenant, the treaties are not as a whole "law making" treaties. The provisions which lie outside the Covenant deal with specific questions political, economic and ethnic to which the war gave rise. Nevertheless, the settlements arrived at on a number of matters involved the application of principles of international law, and the alleged failure of the victors to conform to these principles provoked complaint and protest from the vanquished powers. With the more important of these questions I now proceed to deal.

First, as to the employment of the plebiscite in the case of territorial cessions, it may be remarked that in most instances provision was made for a consultation, in some form, of the inhabitants of the territories which were required to be ceded by the vanquished belligerents. This practice had been adopted in a good many instances in the past,<sup>1</sup> and a few writers have even gone almost to the length of maintaining that the practice had so nearly become a rule of international law that an affirmative vote of the inhabitants was necessary to the validity of a cession. But however much this view may be in accord with international justice, and however much considerations of public policy may make it desirable, it cannot be said to be a rule of international law.<sup>2</sup>

<sup>1</sup> For the details and the documents see Wambaugh, *A Monograph on Plebiscites* (1920.) See also Phillipson, *Termination of War and Treaties of Peace*, pp. 282 ff.

<sup>2</sup> Compare in this connection Funck-Brentano and Sorel, *Précis du Droit des Gens*, pp. 157 and 335, who deny that the practice has become a rule of international law. To the same effect see also, Hall, *Int. Law*, 4th ed., sec. 9; Oppenheim, *op. cit.* (3rd ed.), Vol. II, p. 381; Bonfils-Fauchille, sec. 570; Phillipson, *op. cit.*, p. 282; and Hershey, *Essentials*, p. 183. Merignhac condemned the British annexation of the South African Republics in 1900 because no plebiscite was provided for. International justice, he argues, required that the inhabitants

The treaties of peace of 1919 provided for plebiscites in the cases of the enforced cessions of Eupen, Malmédy, North Schleswig, the Saar basin, Upper Silesia, certain parts of East Prussia, and the Klagenfurt district of Austria.

In the cases of Eupen and Malmédy, however, the consultation of the inhabitants did not precede the transfer of the territories but followed it and it took the form of an open vote by which the inhabitants were allowed to record in writing their preferences.<sup>1</sup> The German delegation to the peace conference protested that such a plebiscite afforded no guarantee of a free and uninfluenced expression of popular opinion and the German government later charged that the manner in which the consultation was actually conducted confirmed this fear.<sup>2</sup> Generally, the

should be consulted. His assertion that the right of consultation is affirmed by the majority of jurists is hardly a true statement of the facts. See his art. in 8 *Rev. Gén.*, p. 96 M. Léon Bourgeois in his book *La Société des Nations* (1921) says the principle is "intrenched in the European conscience" (p. 12). The annexation of Alsace-Lorraine by Germany in 1871 called out much discussion of the subject. The principle was then combatted by German writers such as Holtzendorff, Bluntschli, Geffcken and Stoerk and by Francis Lieber in the United States. See the latter's article in the *Revue de Droit Int. Pub.*, 1871, pp. 139 ff. But the right of consultation was defended by most French writers, among them being Montluc, Ott, Cabouat, Rouard de Card and Audinet. Italian publicists also look with favor on the right. See the opinions cited in Wambaugh, pp. 22-27.

Several of President Wilson's addresses to Congress during the war upholding the principle of "self-determination" were appealed to by the Germans in support of their plea for plebiscites in all the territories which Germany was required to cede. See among others his address of Feb. 11, 1918 in which he said: "Peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were chattels and pawns in a game—peoples may now be dominated and governed only by their consent."

<sup>1</sup> Treaty of Versailles, Art. 34.

<sup>2</sup> Comments by the German Delegation on the Conditions of Peace, *Int. Concil. pam.* No. 143 (Oct. 1919), p. 1230. In the case of the Saar basin the holding of the plebiscite is to be under the control of the Council of the League of Nations which must insure "freedom, secrecy and trustworthiness of the voting." Treaty of Versailles, Ch. III, annex. 34.

plebiscites were held by the local authorities but in the case of Schleswig it was placed in the hands of an international commission of five members, three of whom were designated by the principal allied and associated powers, the other two by the Norwegian and Swedish governments.<sup>1</sup> Where plebiscites are allowed much may be said in favor of this latter method of control. In the cases of Alsace-Lorraine, Poland, Czecho-Slovakia, and the German colonies no provision was made for plebiscites. Against this failure the German delegation protested. As to Alsace-Lorraine the allied and associated powers in their reply to the observations of the German delegation<sup>2</sup> pointed out that the Germans had themselves annexed these territories in 1871 without consulting the wishes of the inhabitants, against which they had never ceased to protest. Furthermore, the inhabitants had not asked for a plebiscite and if it were allowed there would be no doubt as to the result of the vote. The peace conference it was said, had in fact provided for plebiscites in the cases of all cessions where there was doubt as to the wishes of the inhabitants. Where the "affinities" of the population were undoubted there was no need for them.<sup>3</sup> The German delegation frankly admitted that "according to the present conceptions of right" an injustice had been committed in 1871 by the failure of the Germans to hold a plebiscite but they believed that they were justified in their action by "the previous procedure of France and by the racial kinship of the population." In any case, a wrong committed by Germany in 1871 did not justify a

<sup>1</sup> Treaty of Versailles, Art. 109.

<sup>2</sup> The reply is printed in *Int. Concil. pamphlet* No. 144 (Oct. 1919).

<sup>3</sup> *Reply*, pp. 1346, 1363, 1369. There was much complaint that plebiscites were not allowed in other cases of enforced cession; for example some two-thirds of the territory of Hungary was disannexed and added to other states without the inhabitants being consulted. Compare Auer in *Transactions of the Grotius Soc.*, VI, p. 45. The same was true of territories annexed to Czecho-Slovakia.

similar wrong by the allied and associated powers in 1919.<sup>1</sup> As to the failure to provide for a plebiscite in Poland the position of the allied and associated powers was that it would be entirely useless in view of the well known wishes of the inhabitants, and as to consulting the inhabitants of the German colonies, that too was unnecessary because the allied and associated powers were "satisfied that the native inhabitants are strongly opposed to being brought again under Germany's sway."<sup>2</sup>

Regarding the status of the inhabitants of the ceded territories the treaties contained detailed provisions. Most of the treaties of cession concluded during the second half of the nineteenth century had allowed the inhabitants the option of retaining their old nationality, generally, though not always, however, subject to the condition that they should emigrate from the territory within a certain period.<sup>3</sup> Such an option was allowed by the peace treaties of 1919 in all cases except that of Alsace-Lorraine.

<sup>1</sup> Comments by the German Delegation, pp. 1219, 1235. The German delegation also protested against the antedating of the cession of Alsace-Lorraine to the date of the signing of the armistice, contrary to former practice and also contrary to the practice in respect to the other cessions provided for by the treaties of 1919. The making of the cession retroactive was objectionable because it would have the effect of upsetting legal relations established in the territory between the date of the armistice and the going into effect of the treaty. *Ibid*, p. 1236. The allied reply (p. 1363), limited itself merely to the statement that the German objections were "inadmissible" and this they had admitted when they signed the armistice.

<sup>2</sup> *Reply*, p. 1348.

<sup>3</sup> The treaty of Frankfort of 1871, between France and Germany, allowed the inhabitants of Alsace-Lorraine the right of retaining their French nationality but in such case they were required to leave the territory. The treaty of peace between Spain and the United States in 1889 allowed the right of option to Spanish-born residents of the Phillippine islands without requiring emigration. On the whole matter see Cogordan, *La Nationalité*, pp. 328 ff.; Oppenheim, sec. 219; Phillipson, *op. cit.*, pp. 294 ff.; Funck-Bretano and Sorel, p. 338, and Hershey, p. 184, where numerous authorities are cited. The treaties which required emigration in case of option and those which did not require it are enumerated in Bonfils-Fauchille, 5th ed., sec. 430.

In general, the treaties provided that the inhabitants habitually resident in the ceded territories should acquire *ipso facto* the nationality of the states to which they were transferred. But there were some exceptions to this general rule. Thus Germans who had settled in Eupen and Malmédy subsequent to August 1, 1914 could acquire Belgian nationality only by a special authorization from the Belgian Government.<sup>1</sup> And so as to those who had established their domicile in Schleswig after October, 1, 1918,<sup>2</sup> those who had settled in Poland after January 1, 1908<sup>3</sup> (the date of the inauguration of the German system of expropriation and colonization), and those who had settled in the territories ceded to Italy, after May 24, 1915.<sup>4</sup> Likewise as to Alsace-Lorraine only those inhabitants who were natives of the territories—that is, persons of French origin who had lost their French nationality by the annexation to Germany in 1871 and their descendants—acquired *ipso facto* French nationality by re-annexation of the territories in 1919. Germans domiciled therein, provided they had settled there before July 5, 1870, might claim (*réclamer*) French nationality. But those who were born in the territories or who had established their domiciles therein after the abovementioned date, even though they were citizens of Alsace-Lorraine could only acquire French nationality through the process of naturalization as in the case of aliens.<sup>5</sup> These provisions directed against German *émigrés* into Alsace-Lorraine subsequent to 1870 and intended to prevent the acquisition *ipso facto* by

<sup>1</sup> Treaty of Versailles, Art. 36. See the discussion of the status of the inhabitants of Eupen and Malmédy in Clunet, 1922, pp. 833 ff.

<sup>2</sup> *Ibid.*, Art. 112.

<sup>3</sup> *Ibid.*, Art. 91. The German delegation protested against this provision and asserted that there was no reason for treating Germans who settled in Poland after January 1, 1908, differently from those who had settled there before that date. *Comments by the German Delegation on the Conditions of Peace*, p. 1247.

<sup>4</sup> Treaty of St. Germain, Art. 71.

<sup>5</sup> Treaty of Versailles, Art. 79, annex.

them of French nationality by the act of annexation, constituted a departure from the general practice of the past and they differed also from the rule applied by the treaties of 1919 in the case of the other ceded territories, which conferred, of full right, the nationality of the annexing state upon all the inhabitants, generally, who were domiciled prior to the outbreak of the war in the territory annexed. In the place of the classic test of domicile the treaty of Versailles substituted, so far as Alsace-Lorraine was concerned, the test of *lien national*, only the inhabitants who were Alsatians and Lorrainers, that is, those who had been French before 1871, acquiring of full right French nationality in consequence of the annexation.<sup>1</sup>

The treaty of St. Germain, in so far as it related to the status of the inhabitants of the territories ceded to Italy, also departed from the usual practice and it constituted also an exception to the general principle laid down in the other treaties of peace which made domicile alone the test. According to Article 71 of the above mentioned treaty, it was not sufficient that an inhabitant of the ceded territory should have been domiciled there before May 24, 1915 in order to acquire of right Italian nationality by virtue of the annexation; he must, in addition, have been an *originaire*, that is, he must have been born in the territory. Those domiciled there but who were not native born could acquire Italian nationality only by special authorization. The same rule, it may be added, was incorporated in the treaties of June 28, 1919, between the allied and associated powers on the one hand, and Poland, Czecho-Slovakia, Jugo-Slavia, and Roumania

<sup>1</sup> See an article by M. Niboyet entitled, *La Nationalité d'Après les Traités de Paix*, *Rev. Gén.*, 1921 (especially p. 290) where the nationality clauses of the treaties are analyzed and discussed. See also Rippert in *Clunet*, 1920, pp. 251 ff. and 431 ff.; Audinet, *ibid.* 1921, pp. 374 ff., and Pillaut, in the *Rev. de Dr. Int. Privé et de Dr. Pénal Int.*, 1921, No. 1.

## LECTURE I

on the other, in respect to the acquisition of nationality by the inhabitants of the territories ceded to those states. Article 117 of the treaty of Sevres was also unique in that according to its terms no persons of Ottoman nationality whatever, born or domiciled in the Island of Cyprus, acquired British nationality *ipso facto* by virtue of the annexation of the island. It could be acquired in no case except under the conditions prescribed by the local laws. There appears to have been no precedent for a treaty provision of this kind under which all the inhabitants of the annexed territory remained foreigners until they had acquired nationality through the processes of legislation or naturalisation.<sup>1</sup>

All the treaties of peace recognized the right of option, that is, the right of the inhabitants of the ceded territories, if eighteen years of age or above, to retain their old nationality provided the right of option were exercised within a specified period which ranged from one to two years and upon condition that those who availed of it should emigrate within the course of the year following the option. They were free to retain their immovable property and to take with them their personal effects. In the case of minors under eighteen years of age the option of the father included the children and in the case of married women the option of the husband entailed the option of the wife. The latter rule had the advantage of preserving the same nationality for the husband and wife but it doubtless caused hardship in many cases, as where the Polish wife of a German domiciled in Poland acquired against her will German nationality by the option of her husband or the Czech wife of a German similarly acquired German nationality. As the option had to be followed by emigration it was not considered advisable to allow the wife the right of option, since in many cases

<sup>1</sup> Compare Niboyet, art. cited, p. 296.



it would doubtless have led to the dissolution of families if husband and wife opted differently.

The right of option thus described was allowed to the inhabitants of all the numerous territories which were transferred from one sovereignty to another in accordance with the treaties, except in the solitary case of those of Alsace-Lorraine.

As to the inhabitants of these territories the right of option was not allowed; in this respect the treaty provision appears to have been without precedent. The denial of the right was based on the facts of the situation which clearly differentiated it from that of the other territories transferred. The transfer of Alsace-Lorraine was less a case of cession than of restoration. The inhabitants were originally of French nationality and they had acquired German nationality in 1871 against their will. The provinces having been recovered, France had a right, it was said, to reintegrate the inhabitants and reclaim them as her own nationals. They could not therefore be permitted to opt for German nationality even if they so desired.<sup>1</sup>

Most of the treaties of 1919-20 contain an important clause which if executed will not be limited in its effect to cessions of territory. It is an engagement on the part of the enemy signatories to recognize all the changes by which their nationals become nationals of the allied and associated powers, whether in virtue of treaties or by naturalization, and to regard such persons as having in all respects severed their allegiance to their country of origin.<sup>2</sup> This engagement virtually creates an

<sup>1</sup> Compare Niboyet, art. cited, p. 304, who, while justifying the refusal of the right of option as incontestable juridically, admits that from the standpoint of policy it might have been better to have allowed it. Only a few, he thinks, would have exercised the right and they would have been "undesirables" whom France could well have spared.

<sup>2</sup> Treaty of Versailles, art. 278; treaty of St. Germain, art. 230; treaty of Trianon, art. 213; treaty of Neuilly, art. 158; treaty of Sevres, art. 128.

obligation on the part of those states which still hold to the theory of indelible allegiance or which admit the right of their nationals who become naturalized abroad to retain their old nationality (compare in this connection the Delbrück law of Germany, 1913), to modify their legislation so as to bring it into conformity with the general theory that an individual may possess but one nationality and that when he acquires a new nationality he loses thereby his former nationality.

Finally, it may be remarked that the principle of *jus soli* as determining the acquisition of citizenship by birth is definitely sanctioned by the treaties of 1919 between the allied and associated powers and Poland, Jugo-Slavia, Czecho-Slovakia, Bulgaria and Roumania, all of which impose on the latter powers the rule that the nationality of each such state shall be acquired of full right by the sole fact of birth in its territory. In consequence of this rule the status of *heimat losat* which has been so common in the Balkan states will disappear.

Regarding the disposition of public property in the ceded territories and the taking over by the annexing state of a proportional share of the debt of the dismembered state, the treaties contain detailed provisions. As to the status of public property in such cases the uniform practice has been that it passes with the territory and the annexing state acquires title to it equally with the territory. Where the property consists of state-owned railways, telegraph lines, and the like, it is sometimes claimed that the annexing state should make compensation for it. But in 1871 Germany made no compensation to France for the state-owned railways in Alsace-Lorraine although it was claimed that the value of the railways was taken into account in fixing the amount of the indemnity imposed upon France.<sup>1</sup> The treaty of Versailles provided that the Powers to which German territory was ceded should acquire all property and possessions situated

therein belonging to the German Empire or to the German states, including also the public and private property of the Emperor and other royal personages. The value thereof was to be fixed by the reparations commission and paid by the acquiring state to the commission, to be credited to the German government on account of the sums due from it for reparation.<sup>1</sup> In the case of all such property situated in Alsace-Lorraine, France, however, was exempted from the obligation to make compensation therefor, this for the reason that Germany had refused to make compensation to France in 1871. Belgium was likewise exempted from making payment or allowing credit to Germany for any German public property situated in the territories transferred to her.<sup>2</sup> As the amount of such property in the latter territories was inconsiderable the exception to the general rule was practically of little consequence, although the German delegation protested against it on principle. Likewise the mandatories to whom German colonies were transferred were expressly relieved from the obligation to make any payment or allow credit for any German public property situated therein.<sup>3</sup> A similar exception was made in the case of German state property in the territory of Kiao-chou which was acquired by Japan "free and clear of all charges and incumbrances."<sup>4</sup> Regarding the exception in the case of Alsace-Lorraine the German delegation protested energetically and asserted that France should make compensation for the state railways and other national property therein "according to the agreement of 1871." It was even asserted that the obligation was required by international law. The allied and associated powers in their reply to the German protest stated that since Germany had

<sup>1</sup> Similar provisions with some variation are found in the treaty with Austria, art. 208; with Hungary, art. 191; with Turkey, art. 240; with Bulgaria, art. 142.

<sup>2</sup> Treaty of Versailles, articles 56, 67 and 256.

<sup>3</sup> *Ibid*, article 257.

<sup>4</sup> Article 157.

paid nothing for any French state property in Alsace and Lorraine in 1871, there was no reason why France should be obliged to adopt a different policy in 1919. If the owners of the railways had been compensated by Germany in 1871 it was by money drawn from the indemnity exacted from France—in effect therefore it was France and not Germany which had actually compensated the owners.<sup>1</sup> The German delegation likewise protested against the stipulations of the treaty which relieved the mandatories of the former German colonies from the obligation to make compensation for German state property situated therein. It was denounced as “unfair and an unwarranted exception” to the general principle that Germany should be credited with the value of state property in the territories ceded by her.<sup>2</sup> As to the assumption by the annexing state of a proportional part of the public debt of the ceding state the practice of the past had not been uniform although in great majority of cases of cession during the nineteenth century the annexing state had in fact assumed such an obligation.<sup>3</sup> In 1871, however, Germany refused to take over any part of the French debt. A more recent instance still was afforded by the treaty of Lausanne of 1912 by which Italy assumed a portion of the Turkish debt. The practice in fact had been so general during the past century that some writers had gone to the length of asserting that the obligation had become a rule of the law of nations.<sup>4</sup> But however equitable and just the rule may be it is going too far to assert that it had become a principle

<sup>1</sup> *Comments, etc.*, p. 1249.

<sup>2</sup> Réply of the Allied and Associated Powers, p. 1364.

<sup>3</sup> The instances are mentioned in Hershey, *op. cit.*, p. 136, and by Andreades in 15 *Rev. Gén.*, 585. See also Bonfiles-Fauchille, *op. cit.*, secs. 222 ff., and Phillipson, *op. cit.*, pp. 323 ff.

<sup>4</sup> See the discussion of the subject by Andreades in 15 *Rev. Gén.*, pp. 585, where this view is maintained and where the authorities in support of it are cited. Other writers who maintain that the annexing state is under obligation to assume a part of the debt of the dismembered state are Huber, *Die Staatensuccession* (p. 158), and Heffter, *Droit Int.*, sec. 25.

of the positive law of nations.<sup>1</sup> Among those who maintain the existence of the obligation there is a difference of opinion as to what should be the basis for determining the quota to be assumed by the annexing state. Some hold that the ratio between the population of the dismembered state and that of the territory ceded should be taken as the basis; others consider the extent of territory preferable; while others still maintain that the division should be in proportion to the taxable property, assets and resources of the ceded territory. The latter test is the one most generally advocated and it appears to be the most equitable.<sup>2</sup>

The treaties of 1919 were, in the main, in accord with the general practice in regard to the division of debts. The treaty of Versailles stipulated that the powers to which German territory was ceded should undertake to pay a portion of the German imperial *pre-war* debt, the amount of which was to be calculated on the basis of the ratio between the average for the three fiscal years of 1911-13 of the revenues of the ceded territory and the average for the same years of the revenues of the whole Empire. They also undertook to pay a portion of the *pre-war* debt of the particular German state to which the ceded territory belonged, the amount to be determined by the reparations commission on the same basis.<sup>3</sup> Since, however, Germany had refused in 1871 upon the annexation of Alsace-Lorraine to assume any portion of the French debt, France was relieved of all obligation to assume any portion of the German debt on account of the retrocession of Alsace-Lorraine. Likewise Poland was exempted from the obligation to assume any portion of the German debt which in the opinion of the reparation commission had been incurred on account of the German measures

<sup>1</sup> Compare Oppenheim I, p. 148; Hershey, p. 135; and Phillipson, *op. cit.*, p. 322.

<sup>2</sup> Compare Bluntschli, *Droit Int. Cod.*, art. 59; Bonfils-Fauchille sec. 236 and Hershey, p. 136.

<sup>3</sup> Article 254.

of expropriation and colonization in the Polish territory ceded.<sup>1</sup> Finally, the mandatories of the former German colonies were similarly relieved from the obligation to assume any portion of the German imperial or state debts.<sup>2</sup> Against these several exceptions the German delegation protested. As to Alsace-Lorraine it was "unjustifiable" and constituted a departure from an established rule of international law.<sup>3</sup> It was even less defensible in the case of the cession of the German colonies because large expenditures had been made by the German government in the colonies for their benefit.<sup>4</sup> Similarly, the exemption of Poland from the assumption of any portion of the Prussian debt incurred on account of the colonization measures therein could not be defended since the expenditures of the Prussian government had been of great benefit to the inhabitants.

Finally, the German delegation complained that the method of calculating the quota where a portion of the debts was to be assumed would be difficult of execution and the limitation of the undertaking to the *pre-war* debt only, was "unjustified." In consequence, the full cost of the war would have to be borne by the remaining German population although the nationals of the ceded territories had loyally defended the fatherland as readily as their compatriots in the rest of Germany. The debt as it existed at the date of the signing of the treaty of peace should, therefore, be made the basis of the calculation.<sup>5</sup>

The other treaties of peace, like the treaty of Versailles, made similar provision for the partial assumption of the debts of Austria, Hungary, Bulgaria and Turkey. All limited the obligation, however, to the *pre-war* debt although none of them

<sup>1</sup> Article 255.

<sup>2</sup> Article 257.

<sup>3</sup> *Comments of the German Delegation*, p. 1237.

<sup>4</sup> *Ibid.*, p. 1303.

<sup>5</sup> *Ibid.*, p. 1302.

appear to have made exceptions in respect to particular territories ceded as was done by the treaty with Germany. The treaty with Turkey imposed a similar obligation on the states which had been detached from the Ottoman Empire in consequence of the Balkan wars.<sup>1</sup> By reason of the dissolution of the Austro-Hungarian Union, and the breaking up of Austria and Hungary into fragments; some of which themselves became states and some of which were annexed to other states the problem of apportionment was difficult and the provisions of the treaties with both powers are detailed and complex. In brief, they provided that each of the states to which the territory of the former Austro-Hungarian monarchy was transferred and each of the states formed from the dismemberment thereof, including Austria and Hungary, should assume responsibility for a portion of the pre-war debt of the former Austrian and Hungarian governments which was specially secured on the railways, salt mines and other property situated therein, the amount to be determined by the reparations commission. A similar undertaking was made in regard to the unsecured bonded debts of both countries. As to the unbonded pre-war debts of both countries they alone were to be responsible; the new states formed and those to which territory was annexed were not required to assume any portion of them.

A final provision relative to the ceded territories was that which imposed on Germany the obligation to transfer to any power to which German territory in Europe was ceded and to any power administering former German territory as a mandatory, such portions of the reserves accumulated by the German imperial government or the governments of the German states

<sup>1</sup> Treaty with Austria, article 203 and annex; treaty with Hungary, article 186 and annex; treaty with Bulgaria, article 141, and treaty with Turkey, article 241. The Turkish treaty, however, limited the obligation merely to "participation in the annual charge for the service of the Ottoman public debt contracted before November 1, 1914."

or by public or private bodies under their control, as had been set aside for the service of social or state insurance in such territories.

As to Alsace-Lorraine Germany was also required to bear the expense of all civil and military pensions which had been earned by the inhabitants thereof prior to November 11, 1918 (the date of the armistice), and to make compensation for damages to the civil population thereof in the form of fines.<sup>1</sup>

Such, in brief, were the dispositions of the treaties relative to the ceded territories and such were the obligations assumed by both the ceding and annexing states in consequence of the transfer of such territories. Other obligations were imposed on the defeated powers and especially Germany in connection with the use by the allied and associated powers of the territories and waterways which were left to the latter, but it can hardly be said that they involved principles of international law and for that reason it is not necessary to discuss them in detail here. The doctrine of international leases was sanctioned by Article 363 of the treaty of Versailles, which required Germany to lease for a period of 99 years to Czecho-Slovakia certain areas in the ports of Hamburg and Stettin for the transit of goods to and from the latter state. Other articles revived in principle the idea of international servitudes, which the North Atlantic Fisheries arbitration tribunal had condemned in 1909. Thus by Article 358 France was given the right to take water from the Rhine for navigation, irrigation and other purposes and to erect on the German bank all works necessary for the exercise of that right. The German port of Kehl on the Rhine opposite Strasbourg was attached to the latter port for purposes of use and placed under the administration of a manager appointed by the Central Rhine Commission, who was required to reside in Strasbourg. The railway and other

<sup>1</sup> Treaty of Versailles, Art. 312.



bridges across the Rhine between the two ports were declared to be the property of the French state.<sup>1</sup> Czecho-Slovakia was given the right to run its trains over Austrian railroads<sup>2</sup> and the right to have trunk telegraph and telephone lines provided for its exclusive use across Austrian territory.<sup>3</sup> In some cases Germany was required to construct canals and railroads in her territory in order to establish connections with means of transportation in other states or permit the latter to construct them.<sup>4</sup> She was required to allow freedom of transit through her territories and on her waterways to the allied and associated powers and to treat their nationals, vessels and property in German ports in all respects as though they were German.<sup>5</sup> Various German rivers, or parts thereof, were declared to be international, notably the Elbe, the Oder and the Niemen, and also certain canals, and they were placed under the administration of international commissions composed, in part, of non-riparian states, on all of which the German representatives were to be in the minority.<sup>6</sup> Finally, the Kiel Canal was declared to be open to the vessels of commerce and of war of all nations at peace with Germany and on terms of entire equality.<sup>7</sup> These and other provisions of the treaty undoubtedly made serious inroads upon the sovereignty of the German state.<sup>8</sup> But they cannot be said to have been contrary to any rule of international law. So long as the right of war and of conquest are admitted, no limitations can be

<sup>1</sup> Arts. 65 and 66.

<sup>2</sup> Treaty with Austria, Arts. 322-4.

<sup>3</sup> *Ibid.*, Art. 327.

<sup>4</sup> Treaty of Versailles, Part XII.

<sup>5</sup> Arts. 331 ff.

<sup>6</sup> Article 380.

<sup>7</sup> On the whole subject of the new regime of international European rivers as established by the treaties of peace, see a valuable article by M. Hostie in the *Rev. de Droit Int. Pub. et de Lég. Comp.*, 1921, pp. 532 ff.

<sup>8</sup> *Comments, etc.*, p. 1281.

set to the power of a belligerent in respect to the conditions of peace which he may legally impose upon his vanquished adversary. It is a matter of policy which falls entirely outside the domain of international law. The German delegation protested against these as against other provisions, but without result. The stipulations in respect to the inland navigation of Germany in particular, it was complained, would mean the transfer to the allied and associated powers of the "controlling interest in the internal regulation of Germany's whole economic life." They were denounced as incompatible with Germany's sovereignty and therefore impossible.<sup>1</sup> The allied and associated powers in their reply to the German objections denied any intention to impair the sovereignty of Germany or to interfere with the legitimate exercise by her of her economic independence; their only desire was to secure freedom of communication and transit to and from the newly created land-locked states, which in the absence of such guarantees would fall under the economic domination of Germany. The provisions relating to the inland navigation of Germany applied only to rivers which had already been declared international by the Vienna Congress or by later bilateral conventions between the riparian states. Representatives of non-riparian states had been placed on the international commissions of control in order to safeguard the general European interest in the navigation of such rivers. As to the internationalization of the Kiel Canal that was desirable in the interest of the newly arisen Baltic States such as Finland, Esthonia, Livonia, Poland and others for which the canal offered the most convenient outlet to the sea. Moreover, the canal had been constructed primarily for military purposes and now that Germany was to be disarmed the canal would be of little value to her for such purposes. In any case, she would be still free to close it in case she were at war with another power since

<sup>1</sup> *Comments, etc.*, p. 1281.

this right was inferentially admitted by the treaty provision relative to the canal.<sup>1</sup>

Turning now to an examination of those provisions of the treaties of peace which deal with the revival and re-establishment of legal relations interrupted or disturbed by the war, we may begin with a consideration of the dispositions concerning the status of ante-bellum treaties between the opposing belligerents. As is well known, the effect of war on treaties varies according to their nature and object. It is generally admitted that some are terminated by the outbreak of war between the parties, some are merely suspended during the war, some, such as those which deal with the conduct of hostilities and the rights of the parties during war, come into operation upon the outbreak of war, while others, still, are unaffected by the outbreak of war. There is no general agreement, however, among text writers as to what treaties properly fall in some of these classes and the practice has not been uniform.<sup>2</sup> Multi-lateral treaties to which neutral states are parties are admitted to stand on a different footing from those to which all the parties are belligerents. Among the treaties of this kind are those which Professor Oppenheim describes as "law-making" treaties, such as the international conventions relating to the postal service, radio-telegraphy, industrial and literary property, sanitation, etc. In case certain of the parties to such treaties are neutral states, there would seem to be no good reason why they should be treated as terminated by war between other parties.<sup>3</sup>

<sup>1</sup> *Reply*, pp. 1418-23.

<sup>2</sup> The whole matter is discussed by Oppenheim, *op. cit.*, secs. 99 ff.; Hershey, *op. cit.*, sec. 344; Fauchille, *op. cit.*, secs. 1049 ff.; Hyde, *op. cit.*, Vol. II, pp. 91-98; and Phillipson, *op. cit.*, pp. 250 ff. See also Politis's Report on the subject in 24 *Annuaire de l'Institut de Droit International*, pp. 200 ff.

<sup>3</sup> Compare an article by Mr. C. J. B. Hurst entitled "The Effect of War on Treaties" in the *Brit. Year Book of Int. Law*, 1921-23, pp. 37 ff., where a valuable bibliography of the literature may be found. The effect of war on such treaties is a much controverted question, three different views being maintained by the text writers. They are explained

It is difficult to deduce a general rule from the practice. Not infrequently at the outbreak of war belligerents have announced in their declarations of war that certain or all of the treaties between them and their adversaries would be treated as abrogated. By the treaty of peace at the close of the war they were either revived or replaced by new treaties. Among the more recent instances of this procedure were the examples afforded by the Turko-Italian and Balkan wars. At the outbreak of the former war all treaties between the two belligerent powers were declared to be abrogated, but by the treaty of peace they were expressly revived. Likewise the treaty of peace between Greece and Turkey in 1913, between Bulgaria and Turkey in 1913, and between Servia and Turkey in 1914 revived all or certain treaties which were in existence between the parties at the outbreak of the war.<sup>1</sup>

Upon the outbreak of the World War, the German government notified the enemy powers that all treaties of commerce between Germany and them were terminated. As to the status of other treaties no pronouncement was made. By the treaties of peace which Germany imposed upon the Soviet republic of Russia (Brest-Livtosk) and upon Roumania (Bucharest) in 1918 it was declared that the existing treaties between the contracting parties were revived.

The whole matter of the status of treaties between the various belligerent powers at the close of the World War was determined by the treaties of peace of 1919. The action taken appears to have been based on the assumption that all treaties had been terminated by the war and must be expressly revived

by Fauchille, *op. cit.*, pp. 59-60. See also the resolutions of the Institute of International Law on the subject, 25 *Annuaire*, 611 ff.

<sup>1</sup> These and other instances are mentioned by Fauchille, *op. cit.*, sec. 1049; Phillipson, p. 264; and Hyde, II, p. 97. But the treaty of peace of May, 1913, between Bulgaria, Greece, Montenegro and Servia, on the one hand, and Turkey on the other, contained no reference to former treaties.

in order to be binding.<sup>1</sup> A distinction was made between multi-lateral treaties, conventions and agreements, on the one hand, and those which were only bilateral, on the other. As to the first group, such of them as were of "economic or technical character" and were especially enumerated in the treaty of peace were to be "applied" as between Germany, Austria, Hungary, Bulgaria, and Turkey, on the one side, and such of the allied and associated powers as were parties, on the other. Twenty-six such conventions were specifically enumerated. A number of others were to be applied on condition that certain special stipulations were fulfilled by Germany and her allies. Regarding multi-lateral conventions the provisions of all the treaties of peace were nearly identical.<sup>2</sup> Bulgaria, Hungary, and Turkey which were not parties to a number of the international conventions revived were required to adhere to them or ratify them.<sup>3</sup> All the treaties provided that in case a new international radio-telegraph convention should be concluded to take the place of that of July 5, 1912, it should bind each of the central powers even though they should refuse to take part in drawing it up or to subscribe thereto. They were also required to give their assent to the conclusion by the new states of Poland, Czecho-Slovakia, etc., of certain special arrangements referred to in the conventions relating to the postal and telegraph unions.

Regarding bilateral treaties between the allied and associated powers, or any of them, on the one hand, and the enemy

<sup>1</sup> Oppenheim and Fauchille differ as to this. Oppenheim remarks that nothing is said which may be taken to imply that the multi-lateral treaties were in any way abrogated by the war (II, p. 754). Fauchille, on the other hand, thinks that the decision of the peace conference was based on the theory of abrogation (*op. cit.*, p. 58).

<sup>2</sup> Treaty of Versailles, Articles 282 ff.; treaty with Austria, Arts. 234 ff.; treaty with Hungary, Arts. 217 ff.; treaty with Bulgaria, Arts. 272 and 273.

<sup>3</sup> They are enumerated in the treaty with Bulgaria, Arts. 166 and 167, and in the treaty with Turkey, Arts. 272 and 273.

powers on the other, it was provided that each of the former, including those which had never declared war but which had merely severed diplomatic relations, "being guided by the general principles of special provisions" of the treaties of peace, were to notify within a period of six months the other parties such treaties or conventions as it wished to revive and the notification might mention any particular provisions of the said treaties which not being regarded as in accordance with the terms of the treaty of peace, should not be revived. Each of the allied and associated powers undertook not to revive any treaties or particular provisions of the latter character. All treaties not so notified should be considered as abrogated. Likewise all treaties concluded between the enemy powers or any of them since August 1, 1914, and all treaties concluded between them and Russia and between them and Roumania before August 1, 1914, or during the war, were declared to be abrogated.

The treaties with Bulgaria and Turkey contained special provisions relative to the status of the capitulations. At the outbreak of the war the Ottoman government had declared the capitulations at an end so far as it was concerned, but its right to do so was not admitted.<sup>1</sup> The treaty of peace provided that the capitulatory régime resulting from treaties, conventions or usage should be re-established in favour of the allied powers which directly or indirectly enjoyed the benefit thereof prior to August 1, 1914, and that it should be extended to the

<sup>1</sup> It may be remarked also that the government of China, following its declaration of war against Germany and Austria in August, 1917, considering that the treaties of 1861 and 1869 respectively with these two powers which conferred upon their subjects the privilege of extra-territoriality, announced that all civil and criminal cases in which enemy subjects were exclusively parties would henceforth be tried by the Chinese Courts. The Dutch Minister, to whom the care of the interests of the subjects of both these powers had been entrusted, protested vigorously against this action. Ariga, *La Chine et la Grande Guerre Européenne au Point de Vue du Droit Int.* (1920), pp. 177 ff.

allied powers which had not so enjoyed it.<sup>1</sup> The treaty with Bulgaria provided that the capitulatory principles and immunities enjoyed by the allied and associated powers in that country might form the subject of special conventions between each such power and Bulgaria.<sup>2</sup>

Against the decision of the peace conference that only treaties of an economic or technical character, as were specifically enumerated, should be revived, the German delegation protested. Such a principle, it said, was not practicable nor did it "establish a sound and firm basis of justice, which is indispensable to the resumption of international relations." Many of the treaties enumerated had been amended and in some cases they had been modified by special arrangements, subsequent agreements or reservations, so that there would be much doubt as to their status. Furthermore, there appeared to be no good reason why certain multi-lateral treaties had been omitted from the list of those which were to be revived. The German protest was particularly energetic against the stipulation which allowed each of the allied and associated powers to decide which of the bilateral treaties to which it was a party should be revived, and this without the consent of the other party. The provision which allowed each such power to single out particular provisions of a treaty and except them from the rule of revival would allow every former enemy state to demand that Germany resume the obligations prescribed in the old treaties whereas it would be free to repudiate its own obligations.<sup>3</sup>

The allied and associated powers in their reply to the German objections stated that they were "certainly of the opinion that multi-lateral and bilateral treaties between peoples must exist in times of peace, so that the principles of international law may be enforced and normal relations maintained."

<sup>1</sup> Treaty with Turkey, Art. 261.

<sup>2</sup> Art. 175.

<sup>3</sup> Comments of the German Delegation, pp. 1284-85.

To this end, they had aimed at "reapplying all multi-lateral treaties which seemed to them to be compatible with the new conditions arising out of the war." As to bilateral treaties they had reserved for each of the allied and associated powers the right to decide the matter "in conformity with the principles of the treaty of peace." A general indiscriminate reapplication of all multi-lateral treaties, even for a short time, could not be admitted and it was only just that the allied and associated powers should reserve the right to designate which of those treaties with Germany they intended to revive or to allow to be revived. The objections of the German delegation to the clause relating to the revival of bilateral treaties or specific provisions, which were not in accord with the terms of the treaty of peace itself, were based upon misunderstanding. Nevertheless, they were prepared to give an assurance that the provision would not be arbitrarily interpreted for the purpose of splitting up bilateral treaties in such a way that the obligations would remain on one side and on the other side only the rights. In case there should arise a difference of opinion the matter would be referred to the League of Nations for decision. As to the German complaint that states which had broken off diplomatic relations with Germany but which had not declared war (Peru, Bolivia, Ecuador, and Uruguay) should have an equal right with the belligerent powers to notify to Germany the treaties which they desired to have revived, they replied that there was no universally accepted rule of international law, as the German delegation claimed, to the effect that treaties between states which have broken off diplomatic relations, are not affected thereby. The allied and associated powers were therefore free to deal with the matter "in the most convenient manner." Finally, as to the abrogation of the treaties which Germany had entered into with her allies during the war and those she had imposed upon Russia and Roumania, that was justified, for the reason that Germany had taken "undue advantage of the circumstances which she herself created, the pressure she exercised or her



temporary military preponderance." Whatever the consequences to her, it was "impossible to maintain them in force after the conclusion of a treaty of peace based upon the principles of justice."<sup>1</sup>

What was said above in regard to the treaty settlements concerning territorial cessions may be said with even greater truth of the provisions relative to the disposition of treaties subsisting between the powers at the time the war broke out, namely, that the decisions reached represented views of policy on the part of the victorious belligerents rather than any intention to give effect to established rules of international law. The fact is, there were no generally recognized rules of international law relative to the effect of war upon treaties, and especially of multi-lateral conventions the parties to which included neutrals as well as belligerents. The action of the peace conference in reviving some of them and terminating others was therefore, neither contrary to nor in conformity with any rule of the law of nations. As to bilateral treaties, the decision which gave to the victorious party alone the right of revival or termination without the consent of the vanquished party appears to have been unprecedented, but, whatever may be said against the expediency or justice of it, it would be going too far to say that it was contrary to international law. As in respect to other matters, no conclusion can be deduced from the stipulations of the treaties of 1919 concerning the effect of war upon treaties, further than the principle that they are inoperative during the period of hostilities and their revival or abrogation upon the return of peace is left to the decision of the victorious belligerent, subject to such conditions and exceptions as he is able to impose upon the vanquished party.

All the treaties of peace contain elaborate and substantially identical provisions dealing with the effect of the war on private contracts, prescriptions, judgments and debts as between parties

<sup>1</sup> Reply of the Allied and Associated Powers, pp. 1397-1401.

who were enemies during the war. In a former lecture I called attention to the legislation adopted by the principal belligerent powers shortly after the outbreak of hostilities regarding the status to be attributed to contracts concluded before and during the war between enemy parties, and I there briefly reviewed the interpretation which the courts placed upon this legislation and their attitude toward contracts not covered by positive legislation. Since the legislation enacted by no means covered the whole field and since neither it nor the jurisprudence of the courts were entirely uniform as among the various belligerent powers it was necessary that the matter should be dealt with by the treaties of peace. There was a general consensus that contracts involving intercourse between the enemy parties during the war were dissolved by the outbreak of the war and that contracts involving such intercourse but containing a clause suspending their operation during the war, were equally dissolved by the outbreak of the war, on grounds of public policy. There appears, however, to have been some question among recent continental jurists as to whether these two principles were rules of international law.<sup>1</sup> There were also differences of opinion and of practice concerning the effect of war on various particular types of contracts. Had the peace treaties not laid down definite rules regarding the status of all such contracts, difficulties would have arisen between the parties because of the claim on one side that they had been dissolved by the war and the claim on the other side that they had not been affected. All the treaties therefore contained a general provision to the effect that contracts concluded between enemies, with certain specified exceptions, should be regarded as having been dissolved from the date when the parties became enemies, the principal general exception being those in respect to debts or other pecuniary obligations arising out of acts done or money paid

<sup>1</sup> See an article by Mr. E. J. Schuster entitled "The Peace Treaty in its Effects on Private Property" in the *British Year Book of International Law*, 1920-21, especially p. 183.

thereunder.<sup>1</sup> Thus a contract under which a German merchant had before the war engaged to deliver to a British merchant a specified quantity of goods annually for a term of years was not revived by the treaty of peace but the obligation of the British merchant to pay for the goods delivered before the outbreak of the war remained unaffected.

On account, however, of certain provisions in the constitutions of the United States, Brazil, and Japan relative to the non-impairment of the obligation of contracts, it was declared that this rule, as well as some others contained in the treaties, should not apply to contracts between the nationals of these countries and the nationals of enemy states. It is doubtful therefore whether these rules of the treaties of 1919 can be regarded as precedents and therefore binding in the future as rules of international law.<sup>2</sup>

Among the particular classes of contracts excepted from the operation of the abovementioned general rule in respect to dissolution were those of which the execution might be required "in the general interest" by an allied or associated power. But in such a case the party to any contract thus revived was entitled to equitable compensation in the event performance of the stipulation might cause him "substantial prejudice" owing to the alteration of trade conditions, the amount of the compensation to be assessed by a mixed arbitral tribunal.

Other classes of contracts excepted from the general rule of dissolution were those relating to the sale, leasing or mortgaging of real estate when the property had passed or been delivered before the parties became enemies; those relating to mining concessions; those between individuals and governments, central or local; and insurance contracts except marine insurance

<sup>1</sup> Treaty with Germany, Arts. 299-305 and annex; Treaty with Austria, Arts. 251-257 and annex; Treaty with Hungary, Arts. 234-240 and annex; Treaty with Bulgaria, Arts. 180-189 and annex; and Treaty with Turkey, Arts. 304-309 and annex.

<sup>2</sup> Compare Schuster, Art. cited, p. 183.

policies (subject to some exceptions). In the case of life insurance contracts, which were declared not to have been dissolved by the outbreak of war or by the fact of the insured having become an enemy of the insurer, it was provided that any sum which became due on a contract during the war should be recoverable after war with the addition of five per cent. interest and where the contract had lapsed during the war on account of non-payment of premiums the insured or his representatives should have the right within 12 months from the date of the coming into force of the treaty to claim the surrender value of his policy at the date of its lapse. Where the policy had lapsed because of the inability of the insured to pay his premiums on account of the provisions of the trading with the enemy legislation, the assured should have the right to demand the revival of his policy on payment of the accrued premiums with interest at five per cent. This rule was in accord with the principle laid down by the United States Supreme Court during the Civil War and it would seem to be an equitable solution of the problem.<sup>1</sup> As to negotiable instruments made before the war, it was provided that they should not become invalid merely by reason of the failure to present the instrument for acceptance or payment within the required time. In this connection, the treaties provided that all periods of prescription or limitations upon rights of action should be regarded as having been suspended during the war. Rights therefore which would have become extinguished by operation of prescription or through failure of one of the parties to perform his obligations within the time prescribed, were preserved. But this disposition was not entirely mutual as between the parties on one side and those on the other, for in certain contingencies only the allied or associated party had a right of restitution or compensation.<sup>2</sup>

<sup>1</sup> New York Life Insurance Co. v. Statham, 93 U. S., 24.

<sup>2</sup> See the comments of Schuster, art. cited, pp. 185-186

Naturally, the German delegation did not approve in their entirety the rules laid down by the peace conference. "According to the German legal conception the general principle as to the dissolution of pre-war contracts, was," it declared, "open to serious objections, though it did not enter into a discussion of them." It readily admitted, however, that neither the principle of dissolution nor the principle of revival could be maintained without exception. The question as to the exceptions to the general rule of dissolution was one which ought to be determined by a mixed commission of experts.

It protested especially against the provision allowing each enemy power the right to demand "in the general interest" the execution of contracts which under the general principle of dissolution would be abrogated, since its effect was to make the maintenance of contracts between enemies "depend entirely upon the good pleasure of the enemy powers or their nationals," and thus perpetuate the legal uncertainty caused by the war and "abandon German contractual interests to foreign arbitrary power." It took exception also to the non-reciprocal character of Article 302 which declared that judgments rendered by the courts of the allied and associated powers in all cases which under the treaty of peace they were competent to decide should be recognized in Germany as final and should be enforced with reference to whether the party against which judgment was given was able to appear and defend the action, but which allowed nationals of the allied and associated powers against whom judgments had been given by German courts under identical conditions, to claim compensation from a mixed arbitral tribunal in case they had suffered prejudice. This refusal of reciprocity constituted a reflection upon the impartiality of the German courts and could only be explained by the desire of the enemy to undermine their authority - a desire which was perceptible in other like provisions of the treaty.<sup>1</sup> It protested

<sup>1</sup> Comments of the German Delegation, p. 1828.

likewise against the treaty provision (Art. 299d) according to which contracts between inhabitants of ceded territories and former enemies were to be maintained only in case the party living in such territory should acquire the nationality of his former enemy. This was a "one-sided and legally unjustifiable measure" of discrimination in favor of those who chose to elect the new nationality. Equally unjustifiable was the provision in section 12 of the annex which authorized any allied or associated power to cancel life insurance contracts concluded by their nationals with German companies and thereby destroy the foreign business of those companies for the benefit of non-German companies. Finally, the special dispositions relative to contracts made before Nov. 30, 1918 between the inhabitants of Alsace-Lorraine on the one hand and the German Empire, German states and their nationals resident in Germany on the other, were criticized. All such contracts were to be maintained<sup>1</sup> and the German delegation admitted that this was a "natural solution," but the further provision which authorized the French government to notify the German government the cancellation of any such contract (except those in respect to debts or pecuniary obligations) the dissolution of which it might consider to be "in the general interest," was unjustifiable and constituted an "encroachment upon private legal relations."<sup>2</sup>

To these objections the allied and associated powers made a brief reply. Regarding the more important of them, namely, that the maintenance of contracts between enemies was made to depend upon the will of the victorious party, the reply pointed out that cancellation was allowable only when "the general interest" required it, that only the government of which the notifying party was a national, and not the party himself, could demand continuance, and in all such cases the other party was allowed to claim compensation if the maintenance

<sup>1</sup> Treaty of Versailles, Art. 75.

<sup>2</sup> Comments of the German Delegation, pp. 1326-27.

of the contract would in consequence of the altered trade conditions cause him substantial prejudice. As to the German complaint regarding the cancellation of life insurance policies issued by German companies, that disposition was "perfectly equitable" because it would enable the companies to get rid of their liability by handing over the proportion of their assets attributable to such policies. And as to the right of the French government to demand the cancellation "in the general interest" of contracts between the inhabitants of Alsace-Lorraine and German parties, that would be necessary in certain cases "for reasons of a political character." Finally, as to the refusal of the allied and associated powers to recognize the judgments of the German courts in certain cases, "reciprocity was not possible."<sup>1</sup>

All of the treaties except that with Turkey contained detailed and substantially identical provisions regarding the status of industrial, literary and artistic property.<sup>2</sup> These rules laid down are somewhat involved owing to the measures which had been adopted by the various belligerent powers during the war in respect to such property. The Berne copyright convention and the Paris convention for the protection of industrial property were suspended, if not abrogated, by the outbreak of the war in so far as the parties were belligerents. Both conventions were, however, revived and brought into force by the treaties of peace, in favour of all persons entitled to the benefit of them at the time the war broke out, subject to the condition that all acts done during the war in pursuance of the special measures taken by the allied and associated powers in respect to enemy industrial, literary or artistic property should remain in effect and no claim should be made by any enemy person in respect of any loss sustained on account of such measures.

<sup>1</sup> Reply of the Allied and Associated Powers, pp. 1411-1413.

<sup>2</sup> Treaty with Germany, Arts. 306-311; treaty with Austria, Arts. 258-262; treaty with Hungary, Arts. 241-245; and treaty with Bulgaria, Arts. 190-195.

This general rule was reciprocal and applied equally to both sides but there were some other provisions which operated exclusively to the benefit of the nationals of the allied and associated powers.<sup>1</sup> The treaties also contained provisions for preventing the lapse of rights by reason of the non-payment during the war of fees or the non-performance of formalities which the law required of foreign holders of copyrights, patents, trade marks, etc.<sup>2</sup>

The chief complaint of the German delegation against the provisions relative to the treatment of such property was that some of them were non-reciprocal in their application and there were reservations and exceptions in favour of the nationals of the allied and associated powers which were unjustly discriminatory as against German nationals.<sup>3</sup>

The treaties contained more elaborate provisions still regarding the status of pre-war debts due by the nationals on one side to those on the other, and regarding claims for losses and damages.<sup>4</sup> The validity of such debts was recognized and provision was made for their payment through a system of clearing houses by which each signatory state assumed the responsibility for the payment of debts due by its nationals to those of former enemy countries. But this applied only to debts owed by a national residing in his own country to a national residing in the enemy country; it did not cover, for example, a debt owed to a British subject by a German residing in British, allied or neutral territory. Interest at the rate of 5 per cent. throughout the war was allowed except in cases

<sup>1</sup> See the analysis by Schuster, art. cited, p. 188.

<sup>2</sup> See Art. 307 of the treaty with Germany and the corresponding articles in the other treaties.

<sup>3</sup> Comments of the German Delegation, pp. 1331-34.

<sup>4</sup> Treaty with Germany, Art. 296 and annex, and Arts. 297-298 and annex; treaty with Austria, Art. 248 and annex, and Arts. 249-250 and annex; treaty with Hungary, Art. 231 and annex, and Arts. 232-233 and annex; treaty with Bulgaria, Art. 176 and annex, and Arts. 177-179 and annex; and treaty with Turkey, Arts. 287-303.



where by contract, law or custom, the creditor was entitled to a different rate and debts due to nationals of the allied and associated powers were to be paid in the currency of those powers at the pre-war rate of exchange, even though according to the original agreement the amount was payable in the currency of the debtor party. The proceeds of enemy private property held in the territories of the allied and associated powers were chargeable with the payment of debts recoverable under the abovementioned rules.

The German delegation did not object to the principle underlying the clearing house system but it complained that the rules adopted did not rest upon the basis of absolute equality and reciprocity of treatment. It also protested against the requirement that debts due from Germany should be paid in the currency of the former enemy country and against the provision according to which Germany was required to pay in cash any balance against her, whereas in case of a balance in favor of her it was to be retained by the other party and applied to the settlement of claims against Germany.<sup>1</sup> The reply of the allied and associated powers stated that as to the German complaint regarding the non-reciprocal character of the treaty provisions, reciprocity could not be allowed in all respects. In fact it was disallowed only in respect to the retention of balances for the satisfaction of claims against Germany. As to the German complaint concerning payments in the currency of the enemy country the reply admitted that in consequence of the depreciation of the German mark some hardship would necessarily result whatever the basis of settlement adopted. But the method provided for was as fair to both sides as any one which could be devised and it rested upon the principle of reciprocity.<sup>2</sup>

<sup>1</sup> Comments of the German Delegation, p. 1319.

<sup>2</sup> Reply of the Allied and Associated Powers, pp. 1404-06.

Regarding the treatment of enemy private property, held in the territories of the allied and associated powers the treaties proceeded on the principle that such property was chargeable not only with the payment of debts due their nationals but with the settlement of claims for damages or injuries inflicted upon their property in the enemy country and also for claims under the reparations clauses.<sup>1</sup> In all probability the entire amount of such property will be absorbed by the payment of these debts and claims.

The German delegation protested vigorously against the provisions of the treaty respecting the treatment of private property<sup>2</sup> but the allied and associated powers replied that liquidation was "an essential means" by which they could recover a part of their claims.<sup>3</sup>

The treaty dispositions amounted in effect to confiscation of enemy private property held in the territories of the allied and associated powers, and as such, it was unprecedented. It is true that all the treaties contained a provision by which the enemy party undertook to compensate its own nationals whose property was thus appropriated, and if the undertaking is performed, the effect of the dispositions adopted will be to save the owners from loss. But in principle the measure was an act of confiscation and the attempt to throw upon the enemy state the responsibility for indemnifying its nationals whose property was thus taken, hardly deprives it of its confiscatory character. Whether the procedure thus adopted should be accepted as a precedent which ought to be followed in the future there will no doubt be a difference of opinion. On the one hand, it may be argued that the property thus appropriated having been acquired by its owners under the faith of treaties and with the

<sup>1</sup> Treaty of Versailles, Art. 244 and annex, and Arts. 297-298 and annex. The stipulations of the other treaties of peace are substantially the same as those of the treaty with Germany.

<sup>2</sup> Comments, p. 1323.

<sup>3</sup> Reply, p. 1407.

implied understanding that it would be respected, could not be justly confiscated. In case confiscation under such circumstances is to be the rule in the future it may deter foreigners from settling in other countries and acquiring property therein. On the other hand, the knowledge on the part of the commercial classes that those who possess extensive property and business interests abroad will in case of war in which their own country is defeated sustain heavy pecuniary losses, may serve as a wholesome deterring effect in preventing recourse to war.<sup>1</sup>

From the viewpoint of international law the provisions of the treaties of peace in respect to reparations were of the first importance. In several wars of the nineteenth century the victorious belligerents went to the length of exacting from their defeated adversaries the payment of large sums of money under the title of "indemnities,"—sums sufficiently large not only to cover the expense which they had incurred in carrying on the war but also to provide in addition something for their own enrichment. This policy was followed by Napoleon during the wars of the French Revolution and it was carried to extreme limits by Prussia<sup>2</sup> in her wars with Austria in 1866 and with France in 1870-71.<sup>3</sup> The "indemnity" imposed on France in

<sup>1</sup> Compare Schuster, art. cited, p. 189.

<sup>2</sup> The first considerable indemnity stipulated for in a treaty of peace was imposed by the Treaty of Paris of November 30, 1815, on France. The amount was 700,000,000 francs, of which 500,000,000 was divided among the allies to compensate them for the expenses which they had incurred in carrying on the campaign which ended at Waterloo. By the treaty of Prague (1866) Austria was required to pay Prussia the sum of 40,000,000 Prussian thalers to "cover part of the expenses of the war." The German states which fought against Prussia during the war with Austria (Württemberg, Baden, Hesse, and Saxony) were all required to pay indemnities which totalled 217,000,000 francs. By the treaty of San Stefano (1878) Russia demanded of Turkey an indemnity of 1,410,000,000 roubles to cover her war expenses, damages for losses, etc. But the amount was reduced to 802,500,000 roubles.

<sup>3</sup> Fauchille, *op. cit.*, sec. 1705, and Phillipson, *op. cit.*, pp. 269 ff., where the practice is reviewed and the details given.

1871 (5,000,000,000 francs) not only covered the cost of the war to Germany but left a considerable sum for the enrichment of the German treasury. The exaction from a defeated belligerent of a sum sufficiently large to cover the expense of a war which he has himself begun and to repair the damages which have been done may be defended so long as war is recognized as an established mode of settling international differences (though manifestly the cause of the defeated belligerent may be the more just) but the imposition of indemnities above this amount purely for the purpose of self-enrichment is a return to an ancient practice for the defense of which nothing can be said.<sup>1</sup> During the wars since 1871 such instances have been almost unknown.<sup>2</sup>

The treaties of peace following the world war did not exact the payment of indemnities over and above what was considered necessary to cover reparation for damages sustained by the nationals of the victorious belligerents in their persons and property. The treaties which Germany imposed in 1918 upon Russia and Ukraine at Brest-Livtosk, upon Roumania at Bucharest and upon Finland at Berlin contained stipulations by which the parties mutually renounced all claims for reimbursement on account of the expenses of the war and for damages sustained by their nationals by acts of war, but each engaged to indemnify the civil inhabitants of the other for deprivation of their private rights and for damages sustained outside the zones of war in violation of the law of nations. The treaty of Bucharest required Roumania to renounce all claims for reparation on account of damages caused in its territory by German military measures including all requisitions and contributions.

Since Roumania had been systematically pillaged by means of requisitions and contributions exacted by the invaders

<sup>1</sup> Compare Funck-Bretano et Sorel, *Précis du Droit des Gens*, p. 322.

<sup>2</sup> But Japan imposed a war indemnity of 200,000,000 taels upon China by the treaty of Shimonoseki.

the enforced renunciation on her part of all claims under this head was the subject of much complaint by the Roumanians, but a defeated belligerent can hardly expect to be compensated for damages and losses which he has sustained at the hands of his victorious adversary, however just his own cause.<sup>1</sup> As has already been pointed out, the treaty of Versailles abrogated all the abovementioned treaties which Germany had imposed upon her defeated enemies.

The treaties of peace between the allied and associated powers with Germany, Austria, Hungary, Bulgaria and Turkey all contained elaborate provisions in respect to reparation for damages done to the former powers.<sup>2</sup> The terms of those with Germany, Austria and Hungary were substantially identical. Each of the latter powers was required to "accept" responsibility for itself and its allies for causing all the loss and damage to which the allied and associated governments and their nationals had been subjected as a consequence of the war imposed upon them by the central powers. Bulgaria and Turkey were also required to "recognize" that by joining in the war of aggression which Germany and Austria-Hungary had waged against the allied and associated powers they had caused losses for which they ought to make complete satisfaction. All the treaties "recognized" however, that the resources of none of the five powers were sufficient to enable them to make complete reparation. On account of the territorial dismemberment of Turkey all claims against her for reparation, subject to some exceptions, were waived. The treaty with Bulgaria differed from the others in that instead of leaving the amount of the damages to be determined by the reparations commission the treaty itself fixed the amount which Bulgaria should be required to pay

<sup>1</sup> See the analysis and criticism by Iancovici in his book *La Paix de Bucarest*, 7 Mai 1918, especially pp. 114 ff.

<sup>2</sup> Treaty with Germany, Arts. 231 ff.; with Austria, Arts. 177 ff.; with Hungary, Arts. 161 ff.; with Bulgaria, Arts. 121 ff. and with Turkey, Arts. 231 ff.

(2,250,000,000, francs gold). The treaties with Germany, Austria and Hungary required those powers to make compensation for all damage done to the civilian population of the allied and associated powers and to their property during the war, in consequence of their military aggressions by land, sea and air, the amount to be assessed and determined by an interallied commission on reparations.<sup>1</sup> No indemnities, not even for the expenses of the war, were required of any enemy power, except in the case of Belgium which Germany was required to reimburse for the loans which she had incurred during the period of the war (about \$1,000,000,000)—this because Germany had invaded the country in violation of treaties and because the loans had been incurred by Belgium mainly for the purpose of resisting an unjustifiable aggression. The requirement was not therefore an unjust one. The damages for which the three central powers were required to make compensation were classified under ten different heads and they included, besides injuries sustained by civilians on account of various acts by the enemy military, naval and air forces in violation of the principles of humanity, and the laws of war, allowances made or promised by the allied and associated governments in the form of pensions and compensation to victims of the war and their dependants, and also allowances to the families and dependents of mobilised persons. It was a rather broad interpretation which put into the category of "damages" expenditures in the form of pensions and disability allowances, but it must be admitted that if it is legitimate to require a defeated belligerent to make compensation for direct damages and losses it is hardly less so to require him to reimburse his adversary for expenditures on account of pensions and allowances to victims of the war. Among the "damages" specified were those in the form of

<sup>1</sup> The amount finally fixed by the reparations commission in the case of Germany was 132,000,000,000 marks.

"levies, fines, and other similar exactions" upon the civil population. But a belligerent has a lawful right to impose collective fines and to levy pecuniary contributions under certain circumstances and subject to certain well-known rules, and if the right is exercised in accordance with the rules, it cannot be justly regarded as a "damage" for which the belligerent should be required to make compensation. A good many of the fines and contributions levied, especially by the German military commanders during the war, were, however, nothing more than extortions imposed for the purpose of enrichment and with little or no regard to the rules laid down by the international conventions.<sup>1</sup> It was not unjust therefore to compel Germany to make compensation for so gross an abuse of her belligerent rights, the effect of which was to inflict heavy pecuniary losses upon the inhabitants who were the victims, although a distinction might have been made between legitimate fines and contributions and those which were not.

Germany, though not her allies, was required in part satisfaction of her obligations in respect to reparation to devote directly her economic resources to the physical restoration of the territories which she had invaded and occupied. Thus she was required to deliver coal, materials, live stock, chemicals and even to build ships and boats for the allied and associated powers.<sup>2</sup> But for the value of all such objects she was to receive credit on her reparation account. The German delegation naturally protested against the treaty provisions regarding reparations. It readily admitted responsibility for the damage caused to Belgium, in as much as Germany "had brought the terrors of war upon a foreign country by a breach of

<sup>1</sup> See the details in my *International Law and the World War*, Vol. II, Ch. 25.

<sup>2</sup> M. Pillet thinks the treaty should have gone further and required Germany to place at the disposition of the allied and associated powers the services of prisoners of war held by them, for the reconstruction of the invaded regions of Belgium and France especially. See his book

international law," and it was equally willing to accept responsibility for making reparation for damage done in northern France, since the German armies had reached that territory through Belgium whose neutrality had been violated. But as to damages done in the occupied territories of Italy, Montenegro, Servia, and Roumania, Germany could not accept responsibility for reparation since she had not violated international law in waging war against those countries. Italy and Roumania had, in fact, first declared war against Germany and this for purposes of territorial aggression notwithstanding their obligations toward her as allies. And as to Poland she was on peaceful terms with Germany at the time of the armistice and Germany could not therefore be charged with responsibility for any damages suffered by the Polish population. In any case, the demands of the allies for compensation went further than reparation for damages committed in violation of international law. Germany readily accepted responsibility for damages of the latter character but she could not admit an obligation to repair damages which had resulted from acts of war which were not in violation of the rules of international law. Germany herself had considerable claims on account of unlawful acts of the military authorities of the allied and associated powers. The only just and practical solution, therefore, was the establishment of an impartial international court of arbitration to pass upon the claims of both sides. Finally, the German delegation objected that the determination of the amount which Germany should have to pay was left to a commission on which she was allowed no representation—a commission which would plainly have the power to administer Germany

*Le Traité de Paix de Versailles* (1920), p. 102. But M. Fauchille points out that such a requirement would have been contrary to the principle upon which treaties of peace are based, namely, that prisoners of war shall be released. Besides its application would have probably involved serious practical difficulties, not to say danger. *Op. cit.*, p. 1045.



like the estate of a bankrupt. Provision should, therefore, be made for a German commission to co-operate with the inter-allied commission in fixing the amount.<sup>1</sup>

The reply of the allied and associated powers to the German protest began by asserting that the war, planned and started by Germany, was the "greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized, had ever consciously committed," that it had been conducted by Germany in a "savage and inhuman" manner, that the Germans had committed a great variety of atrocities and violations of international law some of which were enumerated in the allied reply and that the allied and associated powers would be false to those who had given their lives for the freedom of the world, if they consented to treat the war on any other basis than as "a crime against Humanity." Justice was the only possible basis for the settlement of accounts; justice was what the German delegation asked for and that was what Germany should have; but it must be justice for all: justice for the dead and wounded, for the orphaned and bereaved and for the peoples who staggered under the war debts which had been incurred that liberty might be saved. Reparation for wrongs was the essence of justice; if this involved hardships for Germany they were hardships which she had brought upon herself. The damages for which she was asked to make compensation were clearly justified under the terms of the armistice; they regretted that it was not possible to notify Germany at once of the amount she was to pay because the extent of the damage and the cost of repairing it had not been ascertained.<sup>2</sup>

The action of the peace conference in requiring Germany and her allies to make compensation for damages done and for losses sustained by the civil population of the allied and

<sup>1</sup> Comments of the German Delegation, pp. 1258-1266.

<sup>2</sup> Reply of the Allied and Associated Powers, pp. 1341-45 and 1349.

associated powers, in so far as they resulted from acts done in violation of the rules of international law, found support in the Hague convention of 1907 respecting the laws and customs of war on land, Article 3 of which declares that "a belligerent party which violates the provisions of the regulations annexed to the said convention shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." It happened that this article was added to the convention upon the proposal of the German delegation. As to the determination of the fact of violation, the extent of the liability, and the amount of compensation the convention is silent. Who shall be the judge as to these matters? Manifestly it cannot be the defeated belligerent for he would never admit responsibility. Apparently it was assumed that it would be the victorious belligerent. But this makes him the judge in his own case and thereby insures that he will not assume responsibility for any damages caused by his own illegal acts or those of his armed forces. It comes to this, therefore, that the conduct of the defeated belligerent will be judged by his victorious adversary and he alone will be required to make compensation although both may be equally guilty of having violated the Hague regulations. It can hardly be admitted that such a solution is satisfactory, for it assumes in effect that only the vanquished belligerent has committed offenses. Would it not be more in accord with the fundamental principles of justice and of modern criminal law that the question of guilt and the amount of compensation to be paid by each offending party, in case both have violated the Hague regulations, should be determined by an international jury or arbitral court composed of representatives of both belligerents and perhaps also of neutral powers? <sup>1</sup> Suggestions

<sup>1</sup> Professor Weiss of the University of Paris on May 19, 1915, suggested that the amount of compensation to be claimed by the allied and associated powers under the abovementioned provision of the Hague convention be determined by the Hague Tribunal of arbitration,

of this kind were not lacking during the war but they evidently did not commend themselves to the peace conference and the determination of the question of guilt and the amount of the compensation to be paid by Germany, Austria and Hungary was devolved upon a commission composed entirely of representatives of the allied and associated powers. It hardly needs to be added that the commission was not authorized to assess damages and allow compensation for losses sustained by the enemy powers on account of violations of the Hague convention by their adversaries or their armed forces. It was therefore a purely one-sided responsibility which the peace conference undertook to enforce and was based on the assumption that the central powers alone were responsible for having started the war and that they alone should be held liable for damages committed in violation of the Hague regulations. The general principle laid down by Art. 3 of the Hague convention that a belligerent who violates the rules annexed to the convention should be required to make compensation for damages resulting from such violations would seem to be irreproachable and it represents an important step in the direction of providing a sanction for the rules of international law, but if the victorious belligerent alone is to be both judge and prosecutor and the defeated belligerent alone is to be required to make reparation for illegal conduct, the value of the principle will be greatly diminished. Some machinery should be provided by which responsibility and the obligation to make reparation may be effectively enforced equally against any and all belligerents who commit acts in violation of the law. If this could be done it would be safe to assume that in future wars violations would be rarer and the

that a provision to this effect be inserted in the treaty of peace and that in case Germany should decline to agree to the treaty stipulation, the allies themselves should submit the matter to the Tribunal. 39 *Revue Pénitentiare et de Droit Pénal*, p. 461.

laws of war would command a respect on the part of belligerents such as they have not enjoyed in the past.

I come in the last place to consider the penal clauses of the treaties of peace. The many and shocking violations of international law especially by the military, naval and air forces of Germany during the war<sup>1</sup> aroused a wide-spread popular demand throughout the allied and associated countries that an attempt should be made at the close of the war to bring to justice such of the guilty offenders as might be apprehended. There was much discussion of the matter, especially among the jurists of England and France and before the end of the war had arrived an extensive literature dealing with the question had already appeared.<sup>2</sup> In general, it was maintained that soldiers who were guilty of acts in violation of the laws of war, especially when those acts were at the same time crimes under the common criminal law, could be tried and punished by the courts of the opposing belligerent in case the offenders should fall into his hands. This principle had received the approval of the Institute of International Law in 1880, Article 84 of whose manual of the laws of war on land declared that in case any of the rules thereof were violated, "the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are." It was further added that "offenders against the laws of war are liable to the punishment specified in the penal law, whenever the person of the offender could be secured."<sup>3</sup> Many of the military manuals or military criminal codes issued by states also recognized that certain acts committed by enemy soldiers in time of war were to be treated as

<sup>1</sup> The peace conference commission on responsibility of the authors of the war charged the enemy powers and those in their service with having committed 37 varieties or categories of such acts. See the list in its report in 14 *Amer. Jour.*, pp. 114-115.

<sup>2</sup> See the bibliography in my *International Law and the World War*, Vol. II, p. 472, n. 2.

<sup>3</sup> *Annuaire de l'Institut*, 1881-88, p. 174.

ordinary crimes and were punishable whenever the offenders fell into the hands of the authorities of the injured belligerent.<sup>1</sup> The French courts, in particular, proceeded on this theory during the war and there were many cases in which German soldiers charged with such acts were tried by French military courts and punished.<sup>2</sup> The application of this principle, which seems entirely sound and just, is, however, beset with many difficulties. There is, first of all, the difficulty of apprehending the culprit who belongs to the armed forces of the enemy. If he cannot be apprehended may he be tried in his absence (*condemnation par contumace*), as some French jurists maintain, and if so, would any consideration of justice be subserved by such a trial? If the crime is committed in foreign territory the courts of states which adhere to the territorial theory of criminal jurisdiction will hesitate to assume jurisdiction of such cases. Finally, may an individual soldier be tried and punished for an act committed by order of a superior commander? During the late war German soldiers who were placed on trial before the French military courts generally pleaded that the acts with which they were charged had been committed by order of their commanders. But the courts generally refused to accept such a plea as a bar to the prosecution and in various instances the offenders were convicted and punished. But is such a principle fundamentally sound and just? On the one hand, it may be argued that to admit such a plea would relieve most offenders from punishment because they would generally allege that they acted under superior order and it would be difficult in many cases to establish the truth or falsity of the allegation. In any case, there is no reason why the plea should be admitted when the offender committed the act voluntarily and without protest, even though he was ordered

<sup>1</sup> Their provisions are analyzed in my work cited above, Vol. II, pp. 474-475.

<sup>2</sup> See especially Merignhac in the *Rev. Gén.*, 1917, pp. 10 ff.

to do so. On the other hand, it is argued that the punishment of a simple soldier for an act which he is ordered to commit and for the refusal to do which he might be shot by his own commander for disobedience, is contrary to the most elementary notions of justice and if adopted as a general rule of international law would be subversive of the very foundations of military discipline. In such a case would not justice require the release of the soldier and the punishment of the officer giving the command? The British manual of military law<sup>1</sup> and the American Rules of Land Warfare<sup>2</sup> both lay down the rule that members of the armed forces who commit violations of the recognized rules of warfare, by order of their government or commander, cannot be punished by the enemy.<sup>3</sup> But both add that the officers or commanders responsible for such orders may be punished by the enemy if they fall into his hands. The rule of the British and American Manuals, however, has been attacked by high authority in England, notably by Hall, Holland, Sir Frederick Smith, Phillipson, Bellot and others as contrary to the Anglo-American doctrine that an individual is responsible for illegal acts committed by him, whether under order or not, and as one which if carried to its logical conclusion

<sup>1</sup> Art. 443.

<sup>2</sup> Art. 366. Article 64 of the French criminal code which regards acts committed by persons constrained by force as not being criminal would seem to cover the case of a soldier who is ordered by his commander to commit an unlawful act. Professor Nast of the University of Strashbourg so interprets it. 26 *Rev. Gén.* (1919). But Merignhac and most French jurists adopt the contrary view. They maintain that the article was not intended to shield soldiers in time of war from the consequences of their illegal acts, otherwise it would be practically impossible to punish any of them. According to their view both the individual offender and the officer giving the command should be held responsible. See Merignhac in 24 *Rev. Gén.* (1917), p. 53. In fact the French military courts during the late war acted in accordance with this view of the matter.

<sup>3</sup> But the Washington treaty of 1922 which stigmatizes submarine attacks against merchant vessels as piracy expressly declares that the plea of superior command shall not be accepted as a justification on the part of submarine commanders.

would render impossible the punishment of war criminals in the great majority of cases.<sup>1</sup> In that case only commanders and superior officers who order the commission of illegal acts would be liable to punishment.

Would this liability also embrace the heads of states who are commanders-in-chief of their armies and navies? And if so, would it also include the head of a state who abdicates or is deposed subsequent to the commission of the acts? There are few precedents governing such cases. Napoleon appears to have been regarded as liable to trial by the British courts after his abdication,<sup>2</sup> but he was never arraigned, though he was punished by being exiled. Jefferson Davis, President of the Southern Confederacy during the American Civil War, was indicted after the close of the war and held for trial before a United States court on the charge of treason and "murder of union prisoners and other barbarous and cruel treatment toward them." After having been held in custody for more than two years he was admitted to bail and was finally released, under the general amnesty of December, 1868.<sup>3</sup>

During the world war there was a more or less wide-spread demand in England and France, especially, that in case

<sup>1</sup> Hall, *Int. Law*, 6th edition, p. 410; Holland, *Laws of War on Land*, secs. 117-118; Phillipson, *Int. Law and the Great War*, p. 260; and Bellot in *Grotius Society, Problems*, II, 46. See also to the same effect Bartlett in 35 *Law Qu. Rev.*, p. 191, and a writer in 18 *Jour. of Socy. of Comp. Leg. and Int. Law*, 154. But Oppenheim, one of the authors of the British manual, naturally approves the rule of non-responsibility. *Int. Law*, II, sec. 253. Sir Walter Phillimore proposes a general agreement stigmatizing as "war crimes" all acts forbidden by the international conventions, that orders given by superior officers to commit such crimes should be declared unlawful, that no soldier should be bound to obey such orders and in case he does he should not be allowed to plead obedience thereto as a justification. *Three Centuries of Treaties of Peace*, p. 167.

<sup>2</sup> Wright, 13 *Amer. Pol. Sci. Review*, p. 120, and the bibliographics of Napoleon cited by Hyde, *op. cit.*, Vol. II, p. 848, note 4.

<sup>3</sup> Rhodes, *History of the United States*, Vol. VI, p. 57.

Germany were defeated the Emperor William II should be placed on trial and held responsible for the acts committed by the German armed forces in violation of the criminal law and the laws of war, if not for having himself provoked the war. The demand was supported by a number of jurists in both countries who maintained that if justice required the punishment of ordinary soldiers guilty of such acts the supreme commander who approved the acts and felicitated, decorated and rewarded the authors was equally liable to punishment. In short the principle of responsibility should be pushed to its logical limit and if it rested upon the Emperor he should also be punished.<sup>1</sup>

Regarding the question of the right of a belligerent to punish offenders against the laws of war, belonging to the armed forces of his adversary, including also his civil functionaries, the international conventions are silent, although as stated above the military manuals of a number of states recognize it. As the matter now stands, it is a question of policy or expediency and not of international law and the victorious belligerent is free to adopt whatever course he may see fit to choose.

Treaties of peace have frequently contained amnesty clauses by which the parties mutually renounced the right to prosecute the subjects of the other for all or certain acts committed by them during the war. Sometimes exceptions have been made of crimes against the common law or acts contrary to the laws and usages of war.<sup>2</sup> In most of the recent treaties of peace the terms of the amnesty clause either expressly stipulated that there should be no prosecutions for so-called "war crimes," or the language employed was so general as to

<sup>1</sup> See Merignhac in 24 *Rev. Gén.*, p. 51; Weiss in 39 *Rev. Gén.*, p. 457; the report of Larnaude and Lapradelle on the trial of the Emperor, in 46 *Clunet*, pp. 131 ff., and report of the Commission of the French Chamber of Deputies, in Barthou, *Le Traité de Paix*, p. 49.

<sup>2</sup> Such an exception was made by the peace of Vereeniging of May 31, 1902, between Great Britain and the South African Republics. The treaty of Lausanne of October, 18, 1912, between Italy and Turkey excepted "common law crimes."



cover them. Such were the treaties of September 29, 1913, between Turkey and Bulgaria; of November 14, 1913, between Turkey and Greece; of March 14, 1914, between Servia and Turkey; of March 3, 1918, between Germany and Russia; of May 7, 1918, between Germany and Roumania; of February 9, 1918, between Germany and Ukraine; and of March 7, 1918, between Germany and Finland.<sup>1</sup>

The treaties of Peace of 1919 between the allied and associated powers on the one hand and the enemy powers on the other, contained however, no amnesty provisions at all. On the contrary they all contained express provisions for trial of enemy persons charged with having committed acts in violation of the laws and customs of war, and the treaty of Versailles included also the former German Emperor. The questions both of the responsibility for the war and the facts as to the breaches of the laws and customs of war by the armed forces of the enemy powers were referred to a commission of the peace conference for investigation and report. The commission made an elaborate report<sup>2</sup> in which it placed the responsibility for provoking the war upon the central powers and their allies, declared that the war had been carried on by those powers by "barbarous methods in violation of the established laws and customs of war and the elementary laws of humanity" and recommended that all persons belonging to the enemy countries who were guilty of such acts or responsible therefor, whatever their rank or position, including also chiefs of states, should be brought to trial and punishment. To exempt heads of states such as the former German Emperor, who were cognizant of such acts and who

<sup>1</sup> The practice is fully reviewed by Phillipson, *Termination of Wars and Treaties of Peace*, pp. 243 ff. See also Fauchille, *op. cit.*, sec. 1700; Simon in 26 *Rev. Gén.*, pp. 245 ff.; and Verdross, *Die Völkerrechts Widrige Kriegshandlung, und der Straf Anspruch der Staaten* (1920), pp. 87 ff.

<sup>2</sup> It was published in English by the Carnegie Endowment for International Peace, Div. of Int. Law, No. 32 (1919). It is also published in 14 *Amer. Jour.* (1920), pp. 95 ff.

approved them "would involve laying down the principle that the greatest outrages against the laws and customs of humanity could in no circumstance be punished."<sup>1</sup> In the main the recommendations of the commission were adopted by the peace conference and embodied in the treaties of Peace. As to the former German Emperor, the treaty of Versailles formally arraigned him for "a supreme offence against international morality and the sanctity of treaties"—and provided that a special tribunal composed of five judges appointed by the United States, Great Britain, France, Italy, and Japan should be constituted to try him and to determine the punishment which in its judgment should be imposed, in case he were found guilty. As he had taken refuge in the Netherlands the allied and associated powers addressed a note to the Dutch government requesting his surrender as an "international duty," compliance with which respect for law and justice, it was said, fully required. The request was promptly refused, on the ground that the laws and traditions of the Netherlands had always regarded the country as a "refuge for the vanquished in international conflicts" and that the government could not extradite a person charged with crime except in pursuance of treaty stipulations. There being no treaty between the Netherlands and any of the allied and associated

<sup>1</sup> The two American members of the commission, Messrs. Lansing and Scott, dissented from that part of the report which recommended the trial of the former German Emperor, this on the theory that he was not responsible for his acts to any authority but that of his own country, that it was contrary to the principle of the immunity of sovereigns from judicial process and that it was without precedent in practice. See their memorandum of reservations in 14 *Amer. Jour.*, pp. 127 ff. See also Mr. Lansing's address in the American Bar Association Reports 44, 255 ff., reprinted in 13 *Amer. Jour.*, pp. 631 ff. Their position is defended by Hyde, *op. cit.*, II, 850, and criticized in my work cited, II, 494. The whole matter of the liability of heads of states to trial is learnedly discussed by Wright in 13 *Amer. Pol. Sci. Review*, pp. 120 ff. The right and duty of the allied and associated powers to try the Emperor is defended by Larnaude and Lapradelle in their Reports in 46 *Clunet*, pp. 131 ff., and by Merignhac in the *Rev. de Droit Int.*, 1920, pp. 47 ff. See also Merignhac et Lémonon, *Le Droit des Gens et la Guerre de 1914-1918*, Vol. II, pp. 565 ff.

powers providing for the surrender of persons charged with "supreme offences against international morality and the sanctity of treaties," the acts charged were not extraditable offences.<sup>1</sup> Considering the uniform practice of states in regard to the extradition of political offenders and the strictness with which extradition treaties are interpreted by states upon whom requests are made for the surrender of fugitives, the non-compliance of the Dutch government with the allied demand was legally irreproachable.

There has been much discussion of various legal questions involved in the proposed trial of the former German Emperor: whether heads of states may be traduced before an international court, whether a distinction as to liability should be made between actual rulers and those who may have abdicated or have been deposed, whether they may be tried for acts which were not crimes by the common law at the time they were committed, whether in the case of the German Emperor he was protected by the principle of non-retroaction of the criminal law, etc. But the fact of the matter is, all such discussion was

<sup>1</sup> The texts of the request addressed to the Dutch government and its reply may be found in the *Rev. De Droit Int.*, 1920, pp. 37-45. The decision of the Dutch government is defended and the reasons therefor are explained by Professor Simons of the University of Utrecht in an article published in 46 *Clunet* (1919), pp. 953 ff. The matter is discussed and the refusal of the Dutch government is justified by a German jurist, Dr. Petong, in an article originally published in the *Preussische Jahrbucher*, a French translation of which may be found in 47 *Clunet* (1920), pp. 132 ff. The Dutch refusal is likewise defended by Professor Jellinek of Kiel in an opinion published in 46 *Clunet* (1919), pp. 162 ff. It is criticized by Merignhac in the *Rev. de Droit Int.*, 1920, pp. 54 ff. M. Travers, a well known French jurist, who discusses the question with admirable impartiality, is inclined to reproach the peace conference for the language employed in describing the offence for which the extradition of the Emperor was requested. Offences against international morality and the sanctity of treaties, as he points out, were not crimes according to the laws of any of the states concerned; the Dutch government could hardly therefore have been expected to surrender a fugitive charged only with such offences. See his article in the *Rev. de Droit Int.*, 1921, especially pp. 134 ff.

beside the point, for the case of the German Emperor was one which was not covered either by the common criminal law or international law. The matter of his trial and punishment was therefore not a question of legal right or power but of policy and expediency.<sup>1</sup> If the allied and associated powers who dictated the terms of peace to Germany considered that he was responsible for violations of the laws of war and should be placed on trial therefor, no one can say that they lacked legal power to traduce him before an international court.<sup>2</sup> The restraints under which a victorious belligerent acts in such cases are not legal restrictions. They had a right therefore to place him on trial not only for crimes at common law but also for the acts with which he was actually charged, namely, a "supreme offence against international morality and the sanctity of treaties." There was and is still a difference of opinion regarding the expediency of the course adopted by the peace conference<sup>3</sup> but there ought to be no difference as to its legal power to act as it did. I venture the opinion, however,

<sup>1</sup> Compare in this connection the remarks of Professor J. S. Reeves in *Procs. of the Amer. Socy. of Int. Law*, 1921, p. 65.

<sup>2</sup> The German delegation in its comments on the conditions of peace appears, however, to have denied the legal right of the allied and associated powers to place the ex-emperor on trial. "The intended criminal prosecution," it said, "is not founded upon any legal basis. The international law in force provides punishment as a sanction for commands and prohibitions; no law of any of the interested states threatens with punishment the violation of the international law of morality or the breach of treaties." "The action of the peace conference involved the creation of a new criminal law with retroactive effect and for an exceptional case. The German government could not allow a German to be placed on trial before a foreign tribunal and for an act which was not punishable at the time it was committed." *Comments*, p. 1287.

<sup>3</sup> Professor Zitelmann of the University of Bonn probably expressed the general opinion in Germany when he denounced the proposed prosecution of the ex-Emperor as "an iniquity." His conduct, Professor Zitelmann added, was approved by the German people, he had their united support throughout the war, he could not be separated from his people; if any one should be tried it should be the entire German nation. See his interview as reproduced in 46 *Clunet*, p. 528.

that the Conference weakened its case in arraigning the ex-Emperor for offences which were not regarded as crimes by the common law or by the legislation of any state. It laid the foundation for much opposition among lawyers whose minds revolt at the thought of prosecuting a man for acts which have not been made criminal by legislation or general consent.<sup>1</sup> It is believed therefore that if the Peace Conference was convinced that the ex-Emperor should share with his subordinates the responsibility for violations of the laws of war which were at the same time criminal acts it would have been more logical to have arraigned him for such acts instead of for offences against international morality and the sanctity of treaties. If it was proper to arraign his highest commanders for the acts committed by their subordinates it was proper to extend the principle of responsibility one degree higher in the hierarchy and apply it to the Commander-in-Chief. Whatever may be said against the policy or expediency of such a course it would at least have removed the objection of the lawyers that a man

The view of the allied and associated powers as expressed in their reply to the comments of the German delegation was that the war was a great crime "deliberately plotted against the lives and liberties of the peoples of Europe; justice required the punishment of those who were responsible for it; their punishment would serve as a deterrent to others who might in the future be tempted to follow their example," etc. The arraignment of the ex-Emperor by the treaty of peace was juridical only in form and not in substance; he was arraigned as "a matter of high international policy, as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice." *Reply*, pp. 1383-4.

<sup>1</sup> Compare Mr. Lansing's address cited (13 *Amer. Jour.*, 642 ff.) where the proposal to try the ex-Emperor for acts which were not recognized as criminal and before a tribunal which was "not a court of legal justice but rather an instrument of political power," is criticized. To the same effect see also Hyde, *op. cit.*, Vol. II, pp. 848 ff. But Hyde adds that society may "change its stand, and possibly, in consequence of the world war, make clear a disposition not merely to hold a country responsible for the conduct of its highest authorities, but also to subject to criminal prosecution before a domestic or international tribunal, one who as the head of a state commits particular acts declared to be contemptuous of international law" (p. 852).

ought not to be tried for acts which are admittedly not criminal according to municipal or international law.

We turn now to the provisions of the treaties regarding other offenders than the German Emperor. Those with Germany,<sup>1</sup> Austria,<sup>2</sup> Hungary,<sup>3</sup> Bulgaria,<sup>4</sup> and Turkey,<sup>5</sup> all required in substantially identical terms, that their governments should recognize the right of the allied and associated powers to bring before their military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons should, if found guilty, be sentenced to punishments laid down by the law. It was further added that no proceedings already taken against them by the courts of their own countries would be admitted as a bar to such prosecution. Their governments were required to hand over to the allied and associated powers, or any one of them as should so request, all persons accused of having committed an act in violation of the laws and customs of war, as should be specified either by name or by rank, office or employment, and to furnish all documents and information of every kind, the production of which might be considered necessary to insure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility. No provision was made for the trial of any former heads of states other than the German Emperor, for in the opinion of the peace conference no others were responsible in the same degree as he was.

It will be noted that there were several important differences between the treaty provisions relative to the trial of the German Emperor and other offenders. In the first place, the latter were to be tried not by an international court but by national courts.—

<sup>1</sup> Arts. 228-230.

<sup>2</sup> Arts. 173-176.

<sup>3</sup> Arts. 157-160.

<sup>4</sup> Arts. 118-120.

<sup>5</sup> Arts. 226-230.

military tribunals—of the country against whose nationals the acts alleged had been committed. The commission on responsibility of the authors of the war recommended the creation of an international high court composed of judges appointed by the allied and associated powers for the trial of all such persons,<sup>1</sup> which court was to apply "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." But the American members opposed this recommendation<sup>2</sup> and it was not adopted by the conference.

In the second place, the acts for which the accused were to be tried were those "in violation of the laws and customs of war." To these the commission in its recommendations added "offences against the laws of humanity," but the American members strongly objected that the "laws of humanity" were something which was too uncertain and varying to be made the basis of a criminal prosecution.<sup>3</sup> These words were accordingly omitted from the treaties. The limitation of the trials to acts in violation of the laws and customs of war placed the allied case on a much surer legal basis than that against the ex-Emperor.

The commission in its report affirmed the general principle that "every belligerent has according to international law the power and authority to try individuals alleged to be guilty of crimes in violation of the laws and customs of war." The American members, who dissented from other parts of the commission's report, concurred in this statement of belligerent right.

<sup>1</sup> See their recommendations in 14 *Amer. Jour.*, p. 122.

<sup>2</sup> *Ibid.*, p. 140. The American members in their dissenting memorandum stated that in their opinion "the nations should use the machinery at hand, which had been tried and found competent, with a law and a procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precept, practice or procedure!"

<sup>3</sup> *Ibid.*, p. 144.

The two Japanese members, however, expressed doubt as to whether such a right could be admitted as "a principle of the law of nations" and whether "international law recognized a penal law as applicable to those who are guilty."<sup>1</sup> As stated above, it really makes no difference, however, whether such a right can be founded on international law or not. It is simply a question of policy and expediency, to be exercised by the victorious belligerent, or not, accordingly as he may judge whether considerations of retributive justice or its moral effect upon the conduct of belligerents in the future may make it desirable. The German delegation protested against the proposed trial by allied military tribunals of German nationals charged with violations of the laws and customs of war as it protested against the proposed trial of the ex-Emperor for offences against international morality and the sanctity of treaties. Such a policy, it was said, would not only perpetuate and intensify the passions engendered by the war but it was itself contrary to international law. According to the law of nations only states were bearers of international obligations and they alone were responsible for acts in violation of the laws and customs of war. If individual offenders deserved punishment it was for their own state to punish them and not other states. Germany was ready to see to it that all violations of international law committed by her nationals were punished with the full severity of the law. She was even prepared to leave to an international tribunal, composed of neutrals, the decision of the preliminary question as to whether a particular act committed during the war was an offence against the laws and customs of war and to allow the authors of such acts to be brought before the tribunal for trial, provided Germany should have a share in the constitution of the tribunal, that its competence should be restricted to questions of international law and the imposition of the punishment should be left to the

<sup>1</sup> See their reservations, *ibid.* pp. 151-152.



German courts. As to the handing over by the German government of its own nationals to foreign governments for trial by their military tribunals that could not be done because it was forbidden by the German criminal code (Sec. 9).<sup>1</sup>

The attempt of the allied and associated powers to require the enemy governments to hand over to them for trial and punishment such of the latter's nationals as were charged with the violation of the laws and customs of war appears to have been without precedent. It must be admitted that the demand was a severe one and there were jurists even in France who doubted whether it was possible of execution and if so whether it was expedient.<sup>2</sup> But the argument that the procedure was without precedent was not in itself conclusive. The whole character of the war was unprecedented, and the settlement of the issues necessitated unprecedented solutions. No war of the past had been characterized by so many shocking and flagrant violations of the elementary laws and customs which the world had accepted as rules of conduct binding upon belligerents. There was no injustice in laying down the principle that those who were guilty of such acts should be punished if apprehended, and in endeavoring to give practical effect to the principle by suitable provisions in the treaties of peace. The only difference of opinion which ought to arise relates to the proper procedure to be adopted in bringing such persons to trial. The requirement that the defeated belligerent should deliver over to the victorious belligerent such of his nationals as are charged with

<sup>1</sup> Comments of the German Delegation, pp. 1288-9. An excellent and, on the whole, a very fair discussion of the whole subject of the responsibility of offenders against the laws of war and their liability to trial before the courts of the enemy may be found in a book by an Austrian jurist, Dr. Alfred Verdross, entitled *Die Völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (Berlin, 1920).

<sup>2</sup> M. Renault, for example, speaking before the French General Prison Society in 1915 of the proposal that such a requirement should be inserted in the treaty of peace in case the allies were victorious, stated that he did not believe any government, even if conquered, would consent to a provision which would involve an abdication of its dignity and sovereignty. 25 *Rev. Gén.*, pp. 25 and 39, *Rev. Pénitentiaire*, p. 425.

criminal acts hardly seems more excessive than the exaction of indemnities to cover the expense of the war or the imposition of other obligations such as were laid upon the defeated belligerents by the treaties of 1919. The argument that it entails an encroachment upon the dignity or sovereignty of the defeated state has little weight, considering that the only limit to a belligerent's right is his physical power. But manifestly the application of the principle in this form is one-sided in its effect, since it covers only offences committed by persons in the service of the defeated belligerent. Who shall judge and punish those belonging to the forces of the victorious belligerent? Shall it be assumed that only those belonging to the forces of the vanquished belligerent have committed violations of the law? Manifestly any just solution of the problem must provide machinery and processes for the trial and punishment of guilty offenders on both sides. Finally, what should be the character of the tribunal before which such offenders should be tried? To traduce them before enemy tribunals hardly seems to be the ideal solution. Such a procedure at the close of a great war marked by the fiercest passion and bitterness is not conducive to impartial justice. Suggestions were made during the late war even by jurists in the allied countries that the offences charged against enemy individuals should be tried before international tribunals,<sup>1</sup> and much can be said in favor of this procedure. The peace conference commission on responsibility of the authors of the war recommended the constitution of a high tribunal composed of judges appointed by the allied and associated powers, for the trial of enemy offenders. The tribunal thus suggested differed from that

<sup>1</sup> Professor Pic of France made such a suggestion. See his remarks in 23 *Rev. Gén.*, p. 267. M. Fauchille in his observations on the international law of the future suggests that those who order, authorize, or allow acts contrary to law as well as those who take part in the commission of such acts, should be traduced before a specially created "high international court," and punished if found guilty. *Droit Int. Pub., Guerre et Neutralité*, p. 1067.

proposed by the German delegation, which was to be a tribunal composed of neutrals, in the appointment of which Germany was to have a share. But neither proposal was adopted by the peace conference. It may be remarked in this connection, that the advisory committee of jurists which drafted the plan for the permanent Court of International Justice (1920) suggested, in addition, the establishment of a "High Court of International Justice" to try "crimes against international public order and the universal law of nations" which should be referred to it by the assembly or the council of the League of Nations, but the recommendation was not adopted. Since the permanent court of International Justice was given no criminal jurisdiction there is as yet no international judicial machinery for the trial of crimes against international law. Whatever may be the divergencies of view as to the proper constitution of the tribunal before which individual violators of the law of nations, when such acts are criminal in character, should be brought to trial, there ought to be no dissent from the general principle that such offenders should be held responsible and wherever possible subjected to punishment. The peace conference commission which considered this matter concluded in their report that it was "desirable that in the future, penal sanctions should be provided for such grave outrages against the principles of international law," as those committed during the late war. The American members of the commission, who dissented from certain other of its recommendations, concurred in this opinion.<sup>1</sup> If such sanctions were provided and effectual machinery devised for applying them, belligerents in the future would show greater respect for the rules of international law which seek to regulate their conduct and it would be safe to assume that violations of the law in future wars would be rarer.

It remains now to consider the execution of the treaty provisions of 1919 regarding the extradition and punishment of

<sup>1</sup> 14, *Amer. Jour.*, p. 140.

the offenders against which they were directed. In accordance with the terms of the Treaty of Versailles the governments of the various allied and associated powers notified to the German government the names of the offenders whose delivery they demanded for trial. The lists aggregated nearly 900 persons including not only ordinary soldiers but also military and naval officers of the highest rank such as Generals Hindenburg, Ludendorff, various admirals, including Von Tirpitz and Von Capelle, high civil functionaries such as the former Chancellor Bethmann-Holweg, and various members of royal families, such as the Crown Prince of Bavaria and the Duke of Wurtemberg. The publication of the list in Germany aroused intense indignation and the German government informed the allied and associated powers that in consequence of the widespread popular opposition to the surrender of men whom the German people regarded as their heroes it would be impossible for the authorities to comply with the demand. In the face of this opposition the Supreme Council of the allied and associated powers agreed to modify their demand and to allow the offenders to be tried by the German Imperial Supreme Court at Leipzig. The German government accepted the proposal and in May 1921 a number of the most flagrant offenders were brought to trial before the supreme court. Witnesses were brought from the countries against which the offences had been committed and legal representatives of the complaining governments attended for the purpose of observing the proceedings. The prosecutions however were conducted by German state attorneys. The first case tried was that of a German officer charged with brutality toward British prisoners. He was convicted and sentenced to ten months' imprisonment. A somewhat similar case against two German generals charged with responsibility for a typhus epidemic in the prison camp at Niederzwehren which resulted in the death of numerous French prisoners resulted in the acquittal of the accused. Another case was that against a naval commander charged with

sinking the English hospital ship *Dover Castle* with the loss of seven lives. He was acquitted on the plea that he acted upon the orders of a superior commandere. Two submarine lieutenants, however, were convicted and sentenced to four years' imprisonment for having fired upon the survivors of the British hospital ship *Llandovery Castle*. A case which attracted much attention was that against General Stenger who was charged with having given an order at Sarrebourg in August 1914 to the troops under his command not to take any prisoners of war and to kill wounded British and French soldiers found on the battlefield. The General appeared in his own defense and denied that he had ever issued any such order, though he admitted having given orders that French wounded soldiers who had fired upon his men from the rear should be killed "without formality." He was acquitted. A major, however, who understood General Stenger's words to be an order to kill prisoners and who transmitted it to the troops under his command, who in turn carried it out, was convicted and sentenced to two years' imprisonment. Another officer charged with murdering in cold blood a French army officer in August 1914 at the village of Herse near Sarrebourg was acquitted and so was a German accused of having murdered some Belgian children. These acquittals and the light penalties imposed in the few cases in which convictions were found evoked wide-spread criticism, especially in Belgium and France, whose governments, as a mark of their dissatisfaction at what was described as the "Leipzig comedy," withdrew the missions which they had sent to watch over the trials. The matter appears to have been brought before the Supreme Council of the allied and associated powers but it took no further action. The few prosecutions which followed resulted in acquittals and the cases against the remaining accused were dropped.<sup>1</sup> Thus the total

<sup>1</sup> The facts given above were taken from the daily press, particularly the *Temps* of Paris. Full details may be found in a book by Mullins

result of the trials amounted to but three or four convictions and the culprits were let off with what was regarded in the allied countries as wholly inadequate punishment. There was much indiscriminate denunciation of the court for its want of impartiality, but, considering that it applied the law of Germany and was no doubt influenced by German legal doctrines concerning the non-responsibility of soldiers for acts committed in war, it was probably too much to expect very different results. The influence of public opinion in Germany no doubt also had its effect for there men like General Stenger—covered as he was with decorations and supporting himself upon crutches as he made his defense—were regarded as national heroes rather than criminals. Altogether the outcome of the Leipzig trials demonstrated completely that the punishment of offenders against the laws and customs of war cannot be left to the courts of their own country if punishment in any effective sense is to be expected. On the other hand, had the German offenders been placed on trial before the military courts of the accusing states it is not unlikely that unjust convictions would have been made and punishments unduly severe would have been imposed. It would seem that in such cases the ends of justice would be better subserved by trials before an international tribunal composed in part, if not wholly, of neutral judges.

entitled *The Leipzig Trials : An Account of the War Criminals and a Study of German Mentality*, with an introduction by Sir Frederick Pollock. London, 1921.

## LECTURE X.

### PROGRESS OF INTERNATIONAL ARBITRATION.

An important chapter in the history of international relations during the past century is that which records the development of agencies and processes for the judicial or quasi-judicial settlement of international differences. The evidence of this progress is found in increasing disposition of states to enter into treaties for this purpose as well as by the increasing frequency with which actual recourse to arbitral methods has been had.

In this lecture I purpose to review the progress that has been accomplished, especially in later years, along these several lines. The highwater mark in the development of arbitral settlement and of practice has, of course, been attained since the beginning of the present century, but the idea of arbitration is older than international law itself, and in fact states have resorted to it from the earliest times. Examples of arbitration were by no means lacking among the Greeks and Romans,<sup>1</sup> and there were instances throughout the middle ages.<sup>2</sup> It was not, however, until modern times and especially until the latter

<sup>1</sup> See Darby, *International Tribunals*, pp. 1-10; Hershey, *Essentials of International Law*, pp. 37 ff., and Phillipson, *International Law and Custom of the Ancient Greeks and Romans*, pp. 5-11.

<sup>2</sup> See Moore, *Hist. and Digest of International Arbitrations*, Vol. V, pp. III, App. 4821 ff.; Nys, *Les Origines*, Ch. 4, and Revon, *Arbitrage International*, pp. 106 ff. There are said to have been 82 cases of international arbitration in ancient Greece between the years 425-100 B. C., and at least 200 cases in mediæval and modern Europe between 800-1794. See the statistics in the *World Peace Foundation* pamphlet, (Vol. VI, No. 6) taken from Tod's *International Arbitration Amongst the Greeks*.

part of the eighteenth century that arbitrations became frequent. Modern practice may be said to have begun in the early part of the nineteenth century with the conclusion of the Jay treaty (1794) between the United States and Great Britain, which provided for arbitration by means of mixed commissions of various disputes between the contracting parties. From that time on, resort to this method of settling disputes became increasingly frequent. Between 1794 and 1900 there are said to have been more than 400 cases of arbitration or quasi-arbitration of differences between states.<sup>1</sup> The questions submitted to arbitration during the nineteenth century embraced almost every conceivable variety of disputes: differences relating to boundaries, occupation and title, fishery rights, private claims of a pecuniary character, claims arising from illegal arrests and detentions, denial of justice, injuries on account of mob violence, riots and insurrections, questions of nationality, interpretation of treaties, collisions at sea, illegal seizures and detentions of ships, confiscation of cargoes, delimitation of bays, jurisdiction on

<sup>1</sup> The *World Peace Foundation* pamphlet cited above places the number at 477. Darby in the book, *International Tribunals*, pp. 669 ff., lists these cases and gives a historical summary of each, but, as Phillipson remarks (*Studies in International Law*, p. 28), Darby in his "laudable enthusiasm" has included a considerable number of cases which can hardly be regarded as arbitrations. Professor J. B. Moore also points out that some of the statistics frequently published are incorrect since they include numerous cases of mediation, boundary surveys, the work of domestic commissions, etc. He places the number of cases of arbitration, strictly speaking, during the 19th century at 136. Of these the U. S. was a party to 57, Great Britain to 33, and France to 12. La Fontaine lists 177 cases between 1794 and 1900, assigning 70 to Great Britain, 56 to the U. S., 26 to France, 9 to Italy, 4 to Russia and none to Germany. See his *Pasicrisie Internationale* (Brussels 1902), also his *Histoire Sommaire et Chronologique des Arbitrages Internationaux, 1794-1900*, in the *Revue de Droit Int. et de Lég. Comparée*, Vol. 34 (1902), pp. 349 ff.; 558 ff., and 623 ff. Each case is accompanied by a brief historical statement. See also the citations from La Fontaine in *Int. Law Assoc. Reports*, Vol. 24, p. x, and in Nys, *Le Droit International*, Vol. I, p. 163. See, finally, a historical review of the important cases decided in the 19th century in Kamarowsky, *Le Tribunal International*, pp. 185-2.



the high seas, rights of navigation, etc.<sup>1</sup> In the great majority of cases the arbitral tribunal employed was a mixed commission composed of an equal number of representatives of the parties in dispute, to whom was frequently added a third party or fifth man representing sometimes one of the parties, but more often being the representatives of a third power. In the Behring sea case, representatives of three non-interested powers were added. In a considerable number of cases the sovereign or chief executive of a third state was selected as the arbitrator. In several instances the Pope acted as the arbitrator or mediator. In one instance the government of a third power was selected as the arbitrator and in one instance the Senate of Hamburg performed this function. A frequent practice consisted in the selection by the parties of a jurist or diplomat of a third power, Professors Martens, Renault and Asser being several times selected for this purpose. In the case of the *Costa Rica Packet* the parties agreed to invite the government of a third power to select from its subjects a jurist of repute to act as arbitrator. (Prof. Martens was chosen.) There being no permanently established tribunal of arbitration the parties were always obliged to agree in each case upon the method of choosing the arbitrators and it often proved to be the most difficult problem to settle. Of the abovementioned procedures each had its

<sup>1</sup> Sir Frederick Pollock roughly classified 200 arbitrations which took place between 1815 and 1900 as follows :

	Per cent.
(a) Claims arising out of warlike operations and for alleged illegal operations or denial of justice ... ..	40
(b) Questions of title and boundaries ... ..	30
(c) Pecuniary claims of citizens in miscellaneous civil matters ... ..	20
(d) Construction of treaties other than boundaries...	10

Quoted by Woolf, *International Government*, p. 68.

As to the question of law and fact involved in many of the decisions of mixed commissions and other arbitral bodies during the nineteenth century, see Ralston's *International Arbitral Law and Procedure* (1910), and Borchard, *Diplomatic Protection of Citizens Abroad* (1915).

merits and demerits. Mixed commissions and heads of states as arbitrators were the most favored but naturally their decisions did not always give satisfaction and the practice of selecting heads of states, in particular, revealed serious defects.<sup>1</sup> The awards in all cases with two or three exceptions where the arbitrators were alleged to have exceeded their powers were accepted by the losing party and were duly executed.<sup>2</sup> The settlement by arbitral methods of so large a number of disputes involving such a variety of issues fully demonstrated the value of arbitration and won for it an increasing number of advocates. Many difficult questions involving issues of law and of fact and even questions affecting what was regarded as the vital interests and honor of states were satisfactorily settled and in some cases, no doubt, prevented the resort to arms between the disputing parties.

In the beginning, arbitration was a purely facultative matter, no treaties making it the duty of the parties to arbitrate any controversy, being in existence. But early in the nineteenth century states here and there began to insert in their treaties an arbitral clause (*clause compromissoire*) by which they agreed to submit to arbitration disputes arising over the

<sup>1</sup> The advantages and disadvantages of each are discussed by Lapradelle and Politis, *Recueil des Arbitrages Internationaux*, pp. xxxviii ff. As to the objections to sovereigns as arbitrators see Kamarowsky, p. 207. On the subject of mixed commissions see Beaucourt, *Les Commissions International d'Enquête*, (1909) and Kamarowsky, *op. cit.*, pp. 165 ff.

<sup>2</sup> The refusal of the United States to accept the award of the King of the Netherlands (1831) in the N. E. boundary case between the United States and Great Britain is well known. In a case between Colombia and Venezuela in 1891, which was referred to the King of Spain as arbitrator, Venezuela was dissatisfied with the award and insisted that a subsequent agreement was necessary to determine the manner of its execution. See an article by M. Fauchille in the *Revue Générale*, 1920, pp. 181 ff. Bolivia refused to accept an award made in 1909 by the President of Argentina in the case of a boundary dispute with Peru, on the ground that the arbitrator exceeded his authority. The refusal was justified by Weiss and Fiore. See Weiss in *17 Rev. Gén.*, 105.

interpretation of the treaty of which the clause was a part, and in some cases, also, to arbitrate other specifically enumerated controversies. The number of such treaties slowly increased but it was not until the last years of the 19th century that they became general.<sup>1</sup> Public sentiment in favor of the conclusion of treaties of this kind increased in proportion as the value of arbitration was demonstrated by the increasing frequency with which important cases were satisfactorily adjusted by recourse to this mode of settlement. A decided impetus to the movement in favor of the further extension of arbitration was given by the successful arbitration in 1872 of the differences between Great Britain and the United States relative to the Alabama claims. The American government contended that Great Britain had failed to perform her duties as a neutral during the Civil War in the United States, particularly in permitting confederate cruisers to be fitted out in British ports and to depart therefrom, in consequence of which the war had been prolonged and the expense of the United States largely increased. The American government demanded an indemnity for the injuries which it had sustained and after several years of discussion the treaty of Washington was concluded by which it was agreed to submit the claims of the United States to arbitration. The treaty contained certain rules defining the obligations which are incumbent upon neutrals in respect to the use of their territory and ports by belligerents, which rules were to be binding upon the arbitrators in reaching their decision, although the British government denied that they were established rules of international law at the time the acts and omissions charged were committed.<sup>2</sup> The arbitrators therefore were restricted to determining whether the British government had conformed to the

<sup>1</sup> Compare Merignhac, *L'Arbitrage International*, pp. 199-214 and Rivier, *Droit des Gens*, Vol. II, pp. 170 ff.

<sup>2</sup> Many writers maintain, on the contrary, that the duties of neutrals as they are set forth in the treaty of Washington were those which international law required at the time, e.g., Merignhac, *L'Arbitrage*, p. 75, and Calvo, *Rev. de Droit Int.*, 1874, pp. 488 ff.

rules laid down in the treaty, and if not, to award damages for the failure to do so. The arbitral tribunal was composed of five members: one appointed by each of the parties and one each by the King of Italy, the President of the Swiss Confederation and the Emperor of Brazil. By a vote of 4 to 1 (the British representative dissenting) the tribunal awarded the United States the sum of \$15,500,000.<sup>1</sup> The decision encountered some dissatisfaction in England but the award was promptly paid. The settlement of the controversy constituted the highwater mark in the progress of international arbitration before the year 1872. The alleged failure of the British government to perform strictly its duties of neutrality during the Civil War had aroused an intense feeling in the United States<sup>2</sup> and it is not improbable that had the controversy not been settled by arbitration, war between the two countries would have resulted. Happily the good sense of both parties and the conciliatory attitude of the British government prevailed. John Morley justly remarked that the settlement of the controversy by arbitration stands out as "the most notable victory in the nineteenth century of the noble art of preventive diplomacy and the most signal exhibition in their history of self-command in two of the chief democratic powers of the western world."<sup>3</sup> The importance of the decision consisted not in its contribution to the development of international law, for aside from the interpretation which the court placed on the meaning of the words "due diligence" in the treaty, the tribunal was not called upon to determine the law. The law governing the duties of neutrals had already been laid down in the treaty and the court had only to apply that law to the facts at issue. The

<sup>1</sup> For a full history of the case see Moore, *op. cit.*, Vol. 4, pp. 4057 ff. See also Phillimore, *International Law*, Vol. III, pp. 251 ff.; Kamarsky, *op. cit.*, pp. 214 ff and the literature there cited. As to the treaty of Washington see Moore, Vol. I, pp. 547-553, and Cushing, *The Treaty of Washington* (1873).

<sup>2</sup> See Cushing, *op. cit.*, p. 15.

<sup>3</sup> Quoted by Foster in his *Arbitration and the Hague Court*, p. 9.

significance of the settlement consisted rather in the demonstration which it afforded of the practicability of arbitration, for it furnished the proof that disputes of the most serious character—disputes which if not peaceably settled will lead to war—can be settled by judicial methods to the satisfaction of the contending parties. Lord John Russell had contended that the dispute was one which affected the honor of Great Britain and could not therefore be submitted to arbitration. But in fact it was so submitted and as Sir Thomas Barclay has aptly remarked “it would be difficult for any one to show that the alternative of a war with the United States would have been of greater advantage or less costly or more to the honor of Great Britain.”<sup>1</sup>

The example thus set was soon followed by other states. Scores of cases were submitted to arbitration in the course of the ensuing 25 years, some of them of great importance. Among the most notable were the Behring Sea fur-seal fisheries case of 1893 which involved the question of the right of the United States to exercise jurisdiction over the high seas beyond the three-mile limit, for the purpose of protecting the fur-seal industry against destruction, and the long-standing controversy between Great Britain and Venezuela (1897) respecting the boundary between the latter country and British Guiana, a controversy to which the United States virtually became a party through its insistence that the dispute should be referred to arbitration. These and other disputes hardly less important were amicably settled and the awards were promptly complied with by the litigating parties.

The happy settlement of the Alabama claims controversy in particular powerfully intensified the popular demand for more frequent recourse to arbitration and gave an impetus to the movement for extending its scope and developing the agencies and processes for facilitating a more ready and frequent recourse

<sup>1</sup> *New Methods of Adjusting International Disputes and the Future*, p. 42 ; compare also Westlake, *Collected Papers*, p. 604.

to it. Peace societies, labor associations, societies for the study and promotion of international law, and even national parliaments now joined in the demand.<sup>1</sup> The Institute of International Law at its meeting in 1874 and 1875 occupied itself with a consideration of the methods by which the cause of arbitration might be promoted and at its session of 1877 it adopted a resolution affirming its desire that recourse to arbitration for the settlement of international disputes should more and more be resorted to by civilized peoples and urgently recommending that in the future a *compromis* clause be inserted in all treaties, providing for the arbitration of disputes concerning the interpretation and application of such treaties.<sup>2</sup> It further recommended that in case the parties could not agree upon the procedure to be followed by the arbitrator or the arbitral tribunal they should apply the rules of procedure which the Institute had formulated in 1875.<sup>3</sup> In the meantime, a movement looking toward the conclusion of general arbitration treaties between states was under way. In 1873 the British parliament adopted an address requesting the Queen to instruct the Secretary of State for foreign affairs to enter into negotiation with other powers "for the further improvement of international law and the establishment of a general and permanent system of international arbitration."<sup>4</sup> In the following year the congress of the United States adopted a resolution requesting the President to open negotiations for "the establishment of an international system whereby matters in dispute between different governments agreeing thereto may be adjusted by

<sup>1</sup> For a review of the movement see Kamarowsky, *op. cit.*, pp. 642 ff. Rivier, *Les Traités d'Arbitrage Permanent*, 34 *Rev. de Droit Int.*, pp. 406 ff.; Descamps, *Essai sur l'Organisation de l'Arbitrage*, *ibid.*, Vol. 38, pp. 14 ff.; Feraud-Giraud, *Des Traités d'Arbitrage Général et Permanent*, *ibid.*, Vol. 33, pp. 333 ff.; and T. W. Balch, 6 (*ibid.*), Vol. 40, pp. 361 ff. and 363 ff.

<sup>2</sup> Text in *Annuaire de l'Institut*, Vol. 3, p. 147.

<sup>3</sup> Text of these rules, *ibid.*, Vol. I, pp. 126 ff.

<sup>4</sup> Kamarowsky, *op. cit.*, pp. 289 ff.

arbitration, and if possible, without recourse to war." The parliaments of other countries followed the example, notably those of Italy, the Netherlands, Belgium, and Sweden.<sup>1</sup> In 1883, the project of a permanent treaty of arbitration between the United States and Switzerland was approved by the Swiss Federal Council but was not ratified by the Senate of the United States mainly on account of a change in the administration at Washington. In 1890 at the international conference of American states held at Washington, a plan of a permanent tribunal of arbitration was adopted and a resolution passed affirming that the Republics of North, Central, and South America "hereby adopt arbitration as a principle of American international law for the settlement of the differences, disputes and controversies that may arise between two or more of them."<sup>2</sup> It was further resolved that arbitration should be obligatory in all cases except those which might "imperil their independence."<sup>3</sup> In the same year the Congress of the United States adopted a resolution requesting the President to invite from time to time foreign governments to enter into treaties with the United States for the settlement by arbitration of disputes arising between them and which could not be settled by diplomacy. In 1893 the British House of Commons adopted a resolution expressing satisfaction at having learned of the American resolution, declaring its sympathy with the purpose of the resolution and pledging the co-operation of the British government. The French Chamber two years later adopted a resolution inviting

<sup>1</sup> *Ibid.*, pp. 298 ff.

<sup>2</sup> Text of the proposed treaty in Darby, *op. cit.*, p. 378. Secretary of State Blaine, who presided over the conference, referring in his closing address to the plan of arbitration recommended, said "We hold up this new *Magna Charta*, which abolishes war and substitutes arbitration between the American republics, as the first and great fruit of the International American Conference."

<sup>3</sup> Text in Darby, p. 380. See also Alvarez, *Latin America and International Law*, *Amer. Jour. of Int. Law*, Vol. 3, p. 329, and Qesada, *Arbitration in Latin America*, pp. 15 ff. The draft of the treaty was not then ratified but it indicated the trend of American sentiment.

the government to negotiate as soon as possible a permanent treaty of arbitration with the government of the United States.<sup>1</sup> As a result of these parliamentary declarations a permanent treaty of arbitration was concluded between the United States and Great Britain in 1897<sup>2</sup> providing for the arbitration of all pecuniary claims not exceeding in the aggregate \$500,000 and not involving territorial claims. Provision was made for an arbitral tribunal consisting of one arbitrator appointed by each of the parties and an umpire selected by the two arbitrators. Controversies involving territorial claims were to be submitted to a tribunal of six arbitrators, three of whom were to be appointed by each party, that is to say, for the decision of such controversies there should be neither outside arbitrators nor an umpire. It was further provided that a decision to be binding must be concurred in by two of the three judges of either party. President McKinley urged the Senate, "not merely as a matter of policy but as a duty to mankind" to ratify the treaty which presented "to the world the glorious example of reason and peace." A substantial majority of the Senate favored ratification but the constitutional requirement of a two-thirds majority could not be obtained and in consequence the treaty never went into effect. The failure of the Senate to ratify the treaty did not, however, discourage the advocates of arbitration and the few remaining years of the century saw the conclusion of not less than a dozen treaties, particularly among the states of Latin America,<sup>3</sup> and during this period a considerable number of controversies were actually settled by arbitration. Meantime, the movement in favor of the establishment of a permanent tribunal of arbitration was well under way and

<sup>1</sup> A historical resumé containing the abovementioned facts was attached to the instructions given the American delegation to the first Hague Peace Conference in 1899.

<sup>2</sup> Text in Darby, pp. 390 ff.

<sup>3</sup> See the list in *World Peace Foundation* pamphlet, Vol. V, No. 5, Part III.



projects were being elaborated and proposed by jurists and law societies.<sup>1</sup>

This was the situation at the end of the nineteenth century when the first Hague Peace Conference assembled. The abundant experience of the century had demonstrated the value of arbitration as a method of settling international disputes and the demand for more frequent recourse to it was world-wide. At the same time, that experience had brought to light its defects and indicated the lines along which further progress could be achieved. In the first place, the lack of a general obligation to arbitrate left states entirely free to resort to armed force in their discretion for the settlement of any and all disputes even those which by general consent were considered as peculiarly suitable for arbitration. In the second place, the lack of an established and readily accessible tribunal before which disputes could be taken constituted a serious obstacle because of the difficulties encountered in finding suitable arbitrators. And in the third place, the lack of a general code of arbitral procedure for the guidance of arbitrators and tribunals further increased the difficulties by making it necessary for the parties to each particular case to agree in advance upon rules of procedure or leave the formulation of the rules to the arbitrators themselves, an alternative which states usually hesitated to adopt.

The first Hague Conference made an effort to remove these defects and to perfect the machinery and processes of arbitration with a view to strengthening the public confidence in the methods of judicial settlement and to facilitate easy and frequent recourse to it. It adopted an elaborate convention for the pacific settlement of disputes, a large part of which related to arbitration the purpose of which as defined by the convention, was the "settlement of differences between states by judges of their own choice and on the basis of respect for law." With a

<sup>1</sup> The movement for the establishment of a permanent court is discussed in Lecture No. XIII.

view to facilitating immediate recourse to arbitration for the settlement of differences which it has not been possible to settle by diplomacy, the convention created a "permanent court of arbitration accessible at all times," to states desiring to have recourse to it. In fact the "permanent court" consists of a panel of Judges (the number is now about 135), each power appointing not more than four members. From this panel disputants select their arbitrators whenever they desire to have recourse to the court. The court thus established in 1899 was improved in some minor particulars by the conference of 1907 and continues to exist at the present time.<sup>1</sup>

In the second place, an attempt was made at both the Hague conferences to encourage more frequent recourse to arbitration by creating an obligation on the part of states to submit certain classes of controversies to arbitration. Various proposals had been made during the latter years of the 19th century looking toward the substitution of obligatory arbitration in the place of facultative arbitration and some bilateral treaties for this purpose had been concluded. The first pan-American Conference (1890) had, as I have pointed out, adopted a project for a general treaty of obligatory arbitration and had declared obligatory arbitration to be a "principle of American international law," but it failed of ratification. At the first Hague Conference the Russian delegation proposed obligatory arbitration for certain specified classes of differences, such as disputes involving pecuniary claims, and disputes relating to the interpretation or application of some twelve different kinds of treaties. A majority of the states represented

<sup>1</sup> As to the nature and defects of the court see Schücking, *International Union of the Hague Conferences*, pp. 43 ff.; Wehberg, *Problems of an International Court of Justice*, Chs. 3-7; and Hershey in 2 *Amer. Jour. of Int. Law*, pp. 29 ff. Details concerning the origin of the court are contained in two articles by D. P. Meyers in 8 *Amer. Jour. of Int. Law*, pp. 769 ff., and 9 *ibid.*, pp. 270 ff. See also the books of Higgins, Holls, Hull, Lémonon, Choate and Foster elsewhere cited.

voted in favour of the proposal but it was finally dropped on account of the opposition of the German delegation. The only achievement in this direction was the adoption of a self-evident declaration that independently of existing general or special treaties which impose an obligation to arbitrate, the powers reserve the right to conclude among themselves new treaties, general or special, with the object of extending obligatory arbitration to all cases which they may consider it possible to submit to it (Art. 19). The Conference also adopted a resolution declaring that in questions of a legal nature and especially those relating to the interpretation and application of treaties, arbitration was recognized by the signatory powers as "the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle" (Art. 16). This resolution, however, was merely the expression of a pious wish and did not impose any obligation whatever. At the second Conference the delegations of the Dominican Republic and Denmark called the attention of the conference to three treaties recently concluded between the Netherlands, Italy and Portugal for the obligatory arbitration of all disputes without exception and proposed a general convention embodying the same principle. But the committee of examination to which it was referred decided unanimously that it would be a waste of time to discuss the proposal since it would certainly be rejected by the conference. A more practicable proposal, however, was one made by the Portuguese delegation following that of Russia in 1899, for a general convention for the obligatory arbitration of certain classes of disputes—some thirty altogether. Of the 24 classes of disputes voted on by the committee, only eight received a majority vote, the delegations of Austria and Germany voting against all of them. Proposals were then made by the delegations of Brazil and the United States providing for the arbitration of all disputes which could not be settled by diplomacy and especially those of a legal nature and those relating to the interpretation of treaties, except certain specified

controversies such as those affecting the independence, territorial integrity, vital interests and honor of the parties. This was *exclusive* as contradistinguished from *inclusive* arbitration, such as the Russian and Portuguese delegations had proposed. The proposal was the subject of a long debate and it had numerous and able advocates but was finally dropped mainly because of the opposition of the German delegation which affirmed that it was in favor of the principle of obligatory arbitration, subject to the exceptions mentioned, but that it was opposed to embodying the principle in a general convention. It professed to favor the conclusion of bilateral treaties with this object in view but was unwilling that Germany should become a party to a world treaty creating such an obligation. In the end 35 delegates voted for the proposal and only 9 against it, but the latter included Germany, Austria, Greece, Roumania and Turkey. The only recorded achievement was the adoption of a *voeu* reciting that the conference was unanimous "in admitting the principle of compulsory arbitration" and "in declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements may be submitted to compulsory arbitration without restriction." It was something for the conference to endorse the principle—this was more than had ever before been done by an international conference representing practically all of the civilized world—but the failure of the conference to agree upon a convention for the application of the principle caused deep disappointment. The head of the American delegation declared the report of the commission to be "a surrender of the advanced position which, by a vote so decisive, it has already attained."<sup>1</sup> Aside from the endorsement of the general principle the contribution of

<sup>1</sup> As to compulsory arbitration at the Hague conferences see an excellent article by Prof. W. I. Hull, in 2 *Amer. Jour. of Int. Law*, pp. 731 ff., Lammasch, *ibid*, Vol. 4, pp. 83 ff., Higgins, *op. cit.*, pp. 82-84; Holls, *op. cit.*, pp. 227-231; Scott, *The Hague Peace Conferences*,

the Hague conferences to the cause of obligatory arbitration therefore amounted to little or nothing.<sup>1</sup> States remained as before free to arbitrate their disputes or not as their interests or sense of justice appeared to dictate; and if they chose to arbitrate they might do so with such exceptions and subject to such restrictions as they saw fit to make. No legal obligation to arbitrate any dispute had been established.

A third means by which the Hague conferences sought "to encourage the development of arbitration" was by the formulation of rules of procedure to be applied by arbitrators and arbitral tribunals in the hearing and determination of the cases submitted to them. The convention of 1899 contained 27 articles laying down rules relating to such matters as the *compromis*, the choice of arbitrators and umpires, the seat of the court, the function of agents and advocates, the choice of languages to be employed by the court, examinations and discussions, documents, the majority necessary to render an award, the binding effect of awards, expenses of the parties, etc.<sup>2</sup> The Conference of 1907 modified these rules in several particulars. Regarding the selection of arbitrators it provided in case of failure of the parties to agree on the composition of the tribunal each party should appoint two arbitrators *of whom only one can be its national* or chosen from among the persons who have been selected by it as members of the permanent court (Art. 45).

Vol. I, Ch. 7; Lémonon, *op. cit.*, pp. 121 ff.; Nippold, *Die Zweite Haager Friedens Konferenz*, Secs. 5 ff.; Darby, *op. cit.*, pp. 745 ff.; and Hull, *The Two Hague Peace Conferences*, pp. 297 ff.

<sup>1</sup> The conference, it should be added however, prescribed obligatory arbitration in respect to claims arising from contract debts whenever the debtor state was willing to arbitrate the claim.

<sup>2</sup> The American delegation in their report to the Secretary of State state that the rules of procedure thus adopted were those proposed by the Russian delegation, with slight amendments. And it adds that "this code is almost identical with the rules of procedure adopted for the British and Venezuela court of arbitration now in session at Paris" and that "the authors of these rules were, it is understood, M. de Martens, President of the court, Mr. Justice Brewer of the United States and Lord Justice Collins of Great Britain."

This insured that three judges, constituting a majority of the court, would be the nationals of disinterested parties, thus giving the court more of an impartial character. Another modification was that introduced by Article 62 which debarred members of the permanent panel from acting as agents, counsel, or advocates except in behalf of the power which appointed them as members of the court. The American delegation regarding it as improper and unprofessional for members of the court to appear before it as counsel had urged that the prohibition be made absolute but it was rejected on the theory that the members of the panel were not really judges.<sup>1</sup> The most important addition made by the convention of 1907 to the rules of procedure was a series of rules providing for a system of summary procedure by a smaller tribunal composed of three judges (Arts. 86-90). This innovation was suggested by the French delegation. The rules of procedure thus elaborated in 1899 and 1907 were, however, nothing more than suggestions; they were not binding upon the parties; it was merely declared that they should "be applicable unless other rules have been agreed upon by the parties." In fact, in several important cases which have been brought before the so-called permanent court the parties have agreed upon different rules of procedure which were embodied in the *compromis* under which the case was submitted to the court. This was true for example in the cases of the Pious Fund (1902), the Orinoco Steamship Company (1909), and the North Atlantic Fisheries (1910). It may be remarked that the American delegation at the first Conference had proposed that the court be left free to determine its own rules of procedure but this suggestion was rejected on the theory that if a code of rules were formulated and adopted by the Conference it might be a means of encouraging recourse to arbitration. By Article 49, however, the right of the court "to issue rules of procedure for the conduct of the case, to

<sup>1</sup> Scott, *The Hague Court Reports*, p. xx.

decide the forms and periods within which each party must conclude its arguments and to arrange all the formalities required for dealing with the evidence" was expressly recognized. Within certain limits therefore the court does possess the power to adopt its own rules of procedure. The rules embodied in the Conventions of 1899 and 1907 are relatively brief and general in character; they by no means regulate all the important matters of procedure. Many of them in fact do not relate to arbitral procedure in the strict sense of the word but to the constitution of the court, the *compromis*, etc., and some of those which relate to procedure deal only with formal matters of no great practical importance. As a result, when the parties actually face each other in court "everything is chaotic so far as procedure is concerned." It is not settled as to who is the plaintiff, there is no established rule as to the order of oral arguments and there is no definite understanding as to the function of the "case" and the "counter-case" as they are referred to in the Hague Conventions. The processes of arbitration might therefore be simplified and difficulties which have actually arisen in concrete cases removed by the adoption of a more complete international code of arbitral procedure.<sup>1</sup>

We may now consider the results that have been actually accomplished through the arbitral agencies and institutions established by the two Hague Conferences. Since the creation of the so-called permanent court of arbitration in 1902, 17 cases have been referred to tribunals organized, wholly or in part, out of the panel of judges who constitute the court. The following is a tabular statement of the cases which have been thus disposed of:—<sup>2</sup>

<sup>1</sup> Such is the thesis of Mr. W. C. Dennis in a learned article in *7 American Journal of International Law* (1913), pp. 285 ff.

<sup>2</sup> Adapted and brought down to date from a table in Scott's *The Hague Court Reports*.

Case.	Parties.	Date of Compromis.	Date of award.	Arbitrators.
1. The Pious Fund Case.	Mexico v. the U. S.	May 22, 1902.	Oct. 14, 1902.	Matzen, Fry, Martens, Asser, Savornin Lohman.
2. The Venezuelan Preferential Case	Germany, Great Britain and Italy v. Venezuela et al.	May 7, 1903.	Feb. 22, 1904.	Mouravieff, Lammasch, Martens.
3. The Japanese House Tax Case.	France, Germany and Great Britain v. Japan.	Aug. 28, 1902.	May 22, 1905.	Gram, Renault, Martens.
4. The Muscat Dhows Case.	France v. Great Britain.	Oct. 13, 1904.	Aug. 8, 1905.	Lammasch, Fuller, Savornin Lohman.
5. The Casablanca Case.	France v. Germany.	Nov. 10, 1908.	May 22, 1909.	Hammar skjöld, Fry Fusinato, Kriege, Renault.
6. The Grisbadarna Case.	Norway v. Sweden.	Nov. 14, 1908.	Oct. 23, 1909.	Loeff, Beichmann, Hammar skjöld.
7. The North Atlantic Fisheries Case.	Great Britain v. the U. S.	Jan. 27, 1909.	Sept. 7, 1910.	Lammasch, Savornin Lohman, Gray Fitzpatrick, Drago.
8. The Orinoco Steamship Company Case.	The U. S. v. Venezuela.	July 13, 1909.	Oct. 25, 1910.	Lammasch, Beernaert, de Quesada.
9. The Savarkar Case	France v. Great Britain.	Oct. 25, 1910.	Feb. 24, 1911.	Beernaert, Renault, Lord Desart, Gram, Savornin Lohman.
10. The Canavaro Case	Italy v. Peru ...	Apr. 25, 1910.	May 3, 1912.	Renault, Fusinato, Calderon.
11. The Russian Indemnity Case.	Russia v. Turkey	July 27, 1910.	Nov. 11, 1912.	Lardy, Baron de Taube, Mandelstam, Herante Abro Pey, Ahmed Réchid Bey.
12. The Carthage Case	France v. Italy	Mar. 6, 1912.	May 6, 1913.	Hammar skjöld, Renault, Fusinato, Kriege, Baron de Taube.
13. The Manouba Case	France v. Italy	Mar. 6, 1912.	May 6, 1913.	Same arbitrators as in the Carthage case.
14. The Island of Jimor Case.	Netherlands v. Portugal.	Apr. 3, 1913.	June 25, 1914.	Lardy.
15. Religious Properties Case.	Great Britain, France, Spain v. Portugal.	July 31, 1913.	June 24, 1920.	Savornin Lohman, Lardy, Root.
16. French Claims against Peru.	France v. Peru	Feby. 2, 1914.	Oct. 11, 1921.	Sarrut, Elguera, Ostertag.
17. Norwegian Ship Owners Case.	Norway v. U. S.	June 30, 1921.	Oct., 1922.	Aaderson, Valloton, Vogt.



It will be seen from the above table that 17 states have been parties to one or more cases before the court, that Germany has been a party in three cases, the United States in five cases, Great Britain in six and France in seven. The size of the arbitral tribunals have ranged from one to five judges, three being the most common. Generally the arbitrators were selected entirely from the panel of the Hague Court but there were exceptions. Thus in the *Grisbadarna Case* (1909) only one of the three arbitrators was a member of the Hague Court, and in the *Russian indemnity case* (1912) only two of the five were members. Only in a limited sense therefore can it be said that these cases were settled by the Hague Court. A commendable tendency revealed by an examination of the above table has been the increasing disposition of the parties to choose the same arbitrators in successive cases. Thus Martens sat in 2 cases of the 17, Hammarskjöld, Fusinato, and Lardy sat in three; Lammasch and Renault in four cases and Savornin Lohman in five cases. The advantage of this practice was that it tended to secure experienced arbitrators and facilitated continuity of jurisprudence. As to the mode of selection of the arbitrators and the composition of the arbitral tribunal there was no invariable practice. In the majority of cases the selection was made in accordance with the mode prescribed by the Hague Convention (Art. 32, Conv. of 1899; Art. 45, Conv. of 1907), that is to say, each party nominated either one or two arbitrators and the arbitrators chose a third or fifth member as an umpire. This was the method followed in the *Pious Fund*, *Japanese House Tax*, the *Casablanca*, the *North Atlantic Fisheries*, *Orinoco Steamship Company*, and the *Savarkar cases*. In a few cases (*e.g.*, the *Carthage case*) the umpire was chosen by the parties. In the *Muscat Dhows case* the arbitrators being unable to agree upon an umpire the parties invited the king of Italy to choose him. In the recent case between the United States and Norway (1922) the parties being unable to agree upon an

umpire, the President of Switzerland was requested to name him. In the Venezuela Preferential case the Czar of Russia was requested to appoint all the arbitrators. Some jurists regard this as the ideal principle for the reason that when the arbitrators are selected by the parties themselves they are less likely to be impartial and independent. But where the parties have no share in the selection they might well be allowed a right of challenge.<sup>1</sup> There is much opinion also in favor of the view that no national of a litigating country should be allowed to participate in the decision of a case in which his own country is an interested party.<sup>2</sup> The Hague Convention of 1899 placed no restrictions upon the parties in this respect but the Convention of 1907 (Art. 45) provided that where each party appointed two arbitrators only one of them could be its national. In the protocols providing for the arbitration of the Pious Fund, Venezuelan Preferential, Muscat Dhows, and Orinoco Steamship cases, it was expressly stipulated that none of the arbitrators should be nationals of the litigating countries; in the Grisbadarna case, it was provided that the umpire should not be a national of or domiciled in either country. In the case between the Netherlands and Portugal the arbitrator, Dr. Lardy, was a citizen of a third country and in two of the most recent cases before the court (the Island of Jimor case and the Religious Property case) the three arbitrators were all "strangers to the controversy." There is still considerable sentiment in favor of the participation of nationals in arbitral proceedings—this on the theory that there is an advantage in allowing the parties to have at least one representative on the tribunal for the purpose of consultation and of furnishing information in respect to matters of law and fact which may not be familiar to the other arbitrators, but it is not improper to observe in this connection

<sup>1</sup> Compare Ralston, Suggestions as to the Permanent Court of Arbitration, 1 *Amer. Jour. of Int. Law*, p. 321.

<sup>2</sup> Ralston, *ibid*, p. 325.

that this service may be more properly performed by agents and counsel rather than by the judges. In short, those who support the view mentioned above confuse the functions of the advocate with those of the judge. In too many cases where judges representing one of the parties sat as arbitrators they dissented from the majority opinion when it was adverse to the claims of their own country. Thus the Japanese arbitrator dissented from the decision of the majority in the Japanese House-tax case while the dissents and protests of Sir Alexander Cockburn in the Alabama case and of the two Canadian arbitrators in the Alaska Boundary case—all because the decisions were against their countries—are well known.<sup>1</sup> These and other instances have accentuated the feeling that the presence of judges who are nationals of one or the other of the parties in controversy is not conducive to impartial decisions. In line with this view, some of the recently concluded treaties of arbitration provide that no citizen of a litigating country shall be allowed to sit as a judge in any case in which his country is an interested party.

It is impossible within the brief limits of this lecture to discuss in detail the cases that have been decided by the Hague court.<sup>2</sup> It must suffice therefore to give only a brief statement as to each.

<sup>1</sup> An incident illustrating the undesirability of including citizens of either party in the arbitral tribunal was afforded by the conduct of the Salvadorean arbitrator in a case between the U. S. and Salvador in 1901, who disagreeing with the majority arose in court and denounced the other two arbitrators for treating him and his country with the "grossest unfairness."

Regarding Sir Alexander Cockburn's conduct in the Alabama case Mr. Cushing says: "The instant that Count Sclopis (the president of the tribunal) closed, and before the sound of his last words had died on the ear, Sir Alexander Cockburn snatched up his hat, and, without participating in the exchange of leave-taking around him, without a word or sign of courteous recognition for any of his colleagues, rushed to the door and disappeared, in the manner of a criminal escaping from the dock, rather than of a judge separating, and that forever, from his colleagues of the Bench."

<sup>2</sup> The texts of the special agreements (*compromis*), the awards and other appropriate documents relating to all these cases except

The first case to be brought before the court, that of the Pious Fund, involved a dispute between the United States and Mexico growing out of the refusal of the Mexican government to continue the payment of interest on certain funds consisting of donations made by Spanish subjects in the 17th and 18th centuries for the propagation of the Roman Catholic religion in the Californias, which funds had been taken over by the Mexican government in 1842. The question of the liability of the Mexican government had been referred to a mixed commission of Mexican and American members who were unable to reach an agreement. It was thereupon referred to Sir Edward Thornton as umpire who in 1875, rendered an award in favor of the United States. The Mexican government paid the amount but declined to pay the interest accruing since 1869. By an agreement signed on May 22, 1902 the two governments referred the matter to a tribunal of five arbitrators organised out of the Hague panel. The two questions submitted were whether the matter was *res judicata* by reason of Sir Edward Thornton's award in 1875 and whether, if not, the claim for interest was just. The tribunal unanimously rendered an award upholding the American claim of *res judicata* and condemning the Mexican government to pay to the United States the sum of \$1,420,682.67 in money having legal currency in Mexico and thereafter in perpetuity an annuity of \$43,050.99 in money of the same country. The payment of the award was duly made by the government of Mexico and the annuity has been regularly paid since.

The second case involved the claim of Great Britain, Germany, and Italy to preferential treatment over the other

the fifteenth, sixteenth and seventeenth may be found in Scott's *The Hague Court Reports* (1916). The texts of the agreements and the awards may also be found in Wilson's, *The Hague Arbitration Cases* (1915). The facts as to the 15th case (Religious Properties) are taken from an editorial in 8 *American Journal of International Law*, pp. 338 ff.; those as to the sixteenth, from *ibid*, 16: 81-84 (text of the compromis, p. 17).

powers which had claims against Venezuela, in respect to the application of certain customs revenues which the Venezuelan government had agreed to set aside for the payment of the claims of the various powers. The three powers claiming priority of payment based their demand on the fact that they had blockaded the ports of Venezuela and forced the Venezuelan government to agree to settle the claims against it. Their claims therefore should not, they maintained, be placed on the same footing with those of the other powers which had taken no part in the blockading measures. Venezuela, declining to accept this view, the matter was by agreement submitted to a tribunal of three arbitrators selected from the Hague panel, the other creditor powers (Belgium, Spain, Sweden, Norway, Mexico, the United States, France, and the Netherlands) being joined with Venezuela as parties.<sup>1</sup> The tribunal decided unanimously that the three blockading powers were entitled to preferential treatment in respect to the payment of their claims out of the revenues set aside for the general liquidation of the claims of all the creditor nations. Among the "considerations" by which the tribunal reached its decision was that Venezuela throughout the diplomatic negotiations had always made a "formal distinction" between the "allied powers" and the "neutral powers" and that the latter powers who claimed equality of treatment with the former did not protest against "the pretensions of the blockading powers to preferential treatment either at the moment of the cessation of the war

<sup>1</sup> The blockading powers requested President Roosevelt to act as the arbitrator of the controversy but he declined, called their attention to the existence of the Permanent Court of Arbitration and suggested that they have recourse to it. The suggestion was adopted. See the President's Annual Message to Congress in December, 1903; also Foster, *The Hague Court of Arbitration*, p. 71.

Working out of the case was a series of arbitrations by mixed commissions to which were submitted the claims of the various creditor nations. Venezuela and the claimant nation were represented on each commission and there was an umpire for each, representing a neutral power.

against Venezuela or immediately after the signature of the protocols of February 13, 1903."<sup>1</sup> The award was accepted by the parties but it was the subject of some criticism, mainly on the ground that it sanctioned the employment of forcible measures for the collection of contract debts.<sup>2</sup> The action of Germany, Great Britain and Italy in blockading the ports of Venezuela for this purpose and the award of the Hague tribunal according to them the right of priority of payment in the settlement of the claims of the powers against Venezuela undoubtedly influenced the second Hague Conference in adopting the Porter convention condemning the use of force in such cases.

The third case, the Japanese House-tax case, involved merely the interpretation of treaties between Great Britain, Germany, and France, on the one hand, and Japan on the other, relating to perpetual leases of certain tracts of land made by the Japanese government to nationals of the three powers mentioned. The action of the Japanese government in subjecting the houses on such lands to taxation evoked a protest from their owners and by an agreement dated August 28, 1902 the controversy was referred to a tribunal of three judges selected from the Hague panel. The tribunal decided, the Japanese member dissenting, that under the treaties referred to, the houses in question were exempt from taxation.

The fourth case, that of the Muscat Dhows, involved the right of France to grant to certain subjects of the Sultan of Muscat the right to fly the French flag upon their dhows or vessels engaged in the coast-wise trade. Great Britain complained that after the conclusion of the Brussels general act of 1890 for the repression of the above trade, the issuance of such authorizations was contrary to a treaty of 1862 between Great Britain and France by which they reciprocally engaged to

<sup>1</sup> Scott, *Hague Court Reports*, p. 60.

<sup>2</sup> Compare Hershey, *Essentials of International Law*, p. 334 n. 39, and Mallarme, *L'Arbitrage Vénézuélien devant la Cour de la Haye*, in 13 *Revue Générale*, pp. 423 ff.

respect the independence of the Sultan of Muscat. Being unable to settle the dispute through diplomatic channels the two governments by a *compromis* of October 13, 1904 agreed to refer the matter to a tribunal of three arbitrators selected from the Hague tribunal. The tribunal held that every sovereign state has a right to grant authority to whomsoever it pleases to fly its flag but that the right of France in the present case was limited by the Brussels general act, to native vessels owned or fitted out by her subjects or *protégés*. Moreover the owners of Muscat dhows to whom such authorizations were granted did not enjoy in consequence thereof any exemption from the sovereignty of the Sultan, since such immunity would be inconsistent with the reciprocal engagement of 1862 between Great Britain and France respecting the Sultan's independence.<sup>1</sup>

The Casablanca case grew out of a conflict of jurisdiction between the French authorities in occupation of Casablanca, Morocco, and the German consul. Several soldiers, three of whom were of German nationality, having deserted from the French foreign legion in 1908, were given protection by the German consul in the exercise of his extra-territorial jurisdiction and were subsequently granted safe conducts to return to their homes. Before embarking, however, they were forcibly taken from the custody of the consul. The French government contended that the territory of Morocco being under French military occupation the consul had no right to offer protection to the deserters of German nationality. The German government maintained the contrary view. The controversy was trivial in itself but in consequence of the somewhat strained relations between the two powers it threatened to become serious. As the question involved was peculiarly suitable for arbitration, both parties agreed to refer it to a tribunal chosen from the Hague court. The tribunal held that the conflict of jurisdiction was one which

<sup>1</sup> See an article on the case by M. Bressonet in 13 *Revue de Droit Int. Pub.*, pp. 145 ff.

could not be decided by an absolute rule but that the deserters from the French foreign legion were subject to the exclusive jurisdiction of the French authorities and that the German consul had no right to grant protection to them. Nevertheless the French authorities should have respected the authority of the consul and should have refrained from resorting to forcible measures until the question of jurisdiction had been settled.<sup>1</sup> The award while in favor of French was phrased in words which were guarded and palatable to Germany; it blamed the German consul and yet exonerated him from intentional fault. Likewise it blamed the French authorities and yet upheld their claim. The decision was largely a compromise; it could hardly have been otherwise without being unacceptable to one or the other of the parties. It was a triumph of diplomacy not so much by the foreign offices as by the tribunal. As such it demonstrated the soundness of M. Bourgeois's remarks at the Second Hague Conference that perhaps the permanent court of arbitration was better adapted for the determination of political controversies than would be an international court of justice composed of judges acting under a strict sense of judicial responsibility and applying strict legal rules to the decision of cases.<sup>2</sup>

The sixth case involved a boundary dispute between Norway and Sweden. The tribunal consisted of three arbitrators, only one of whom, however, was selected from the Hague panel. The tribunal was not therefore constituted in accordance with the Hague Convention which contemplates that the arbitrators shall be selected from the Hague panel. Nevertheless, the tribunal having sat at the Hague and utilized the premises and staff of

<sup>1</sup> See an article by M. Gidel entitled *L'Arbitrage de Casablanca* in 17 *Revue Générale*, pp. 326 ff., where it is stated that the decision was a notable victory for the cause of arbitration, that it was based upon principles of moderation and equity, and that it was highly approved by the people of both countries.

<sup>2</sup> Compare an editorial in 2 *Amer. Jour. of Int. Law*, p. 701. Hershey (*op. cit.*, p. 335, n. 39) remarks that the decision appears to have been "a Scotch verdict."



the International Bureau, in accordance with article 26 of the Hague Convention, it may be said that the arbitration was made "under the auspices of the permanent court."<sup>1</sup> The question submitted to it was whether the treaty of 1661 fixed the boundary in dispute; if it did not, the tribunal was to determine the boundary in accordance with the "principles of international law." The tribunal found that the treaty had not wholly fixed the line and it accordingly determined the true line from the point where its certainty ceased, according to the rules of international law as they existed at the time of the conclusion of the treaty, among which was the principle that "maritime territory is an essential appurtenance of land territory." The rule of drawing a median line midway between inhabited lands was not, the tribunal held, insufficiently supported by the law of nations in force in the 17th century and the same conclusion was reached regarding the doctrine of the *thalweg*.<sup>2</sup>

The case of the North Atlantic fisheries was probably the most important of all the cases referred to the Hague court, not only because of the gravity of the questions involved but because it was a controversy of nearly a hundred years standing and for the settlement of which all the resources of diplomacy had been exhausted without success. The case involved not only the interpretation of an old treaty (that of 1818); but delicate questions of international law. The *compromis* specified that seven questions should be submitted to the tribunal. The first and most important of these was whether the British government directly or through the medium of the legislatures of Canada or Newfoundland might regulate in a reasonable manner the exercise by American fishermen of the right of fishing in the treaty waters of British North America without the consent of the United States, such regulations being

<sup>1</sup> Compare an editorial in 4 *Amer. Jour. of Int. Law*, p. 186.

<sup>2</sup> Scott, *Hague Court Reports*, p. 129. The decision is criticized in an editorial in 10 *Amer. Jour.*, p. 677.

designed for the protection and preservation of the fisheries and in the interest of the public order and morals. The British government contended that such regulations were not inconsistent with the privilege of fishing which the convention of 1818 granted to citizens of the United States. The American government, on the other hand, denied the right of the British or dominion legislatures to make such regulations unless their reasonableness and appropriateness were agreed to by the two governments in common. A second important question was, from where must be measured the three marine miles of the coasts, bays, creeks and harbors in or within which the United States had by the convention of 1918 renounced the right to take, dry or cure fish. Great Britain contended that the renunciation embraced *all* bays and waters within three miles thereof; that the word "bays" in the treaty was used in both a geographical and territorial sense so that American fishermen were excluded from fishing in all bodies of waters regardless of the width of their entrance, which were designated as "bays" on the maps of the time. Whether a body of water was a "bay" or open sea depended largely upon its configuration and upon its depth rather than upon its width at the entrance. The United States, on the other hand, contended that the word "bays" was used only in the territorial sense and that consequently the United States had renounced the right to fish only in such bays the entrance to which was less than six miles wide and that in measuring them the line should be drawn across the bays where they were six miles wide or less. The other five questions were relatively of much less importance and were largely of a subsidiary nature.

Regarding the first of the two questions mentioned above, the tribunal decided that the British government had the right to make the regulations referred to, without the consent of the United States, provided they were *bona fide*, not in violation of the treaty, were appropriate or necessary for the preservation of the fisheries, were desirable or necessary for reasons of

public order or morals, did not unnecessarily interfere with the right of fishing and provided they were equitable and fair as between local and American fishermen and did not give an advantage to the former over the latter. The necessity of obtaining the consent of the United States would, the tribunal said, predicate an abandonment on the part of Great Britain of her independence in this respect and the recognition by the latter of a concurrent right of regulation in the United States; and it added that if the consent of the United States were necessary it would amount to a veto power, the full exercise of which would be "socially subversive and would lead to the consequence of an unregulated fishery." The tribunal further decided that in case of controversy as to the reasonableness of any such regulations the dispute should be referred to a commission of three experts, one designated by each of the parties and the third to be appointed by the court. This last part of the award was in the nature of a recommendation which, it may be remarked, was duly accepted by the parties.

As to the question of "bays" the tribunal upheld the British contention and decided that the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay, but that at all other places they are to be measured following the sinuosities of the coast. Dr. Drago dissented from the decision of the majority and filed a vigorous opinion in which he upheld the contentions of the United States, particularly in respect to the measurement of bays. No rule was laid down or general principle evolved by the decision of the tribunal, he said, for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose its characteristics as such.

An interesting part of the decision of the tribunal is that in which it repudiated the doctrine of international servitudes upon which the case of the United States rested in part. The

American government had contended that the liberty of fishing granted to the inhabitants of the United States by the convention of 1818 constituted an international servitude in their favor over British territory and that consequently Great Britain had lost her right to regulate the fishery. In rejecting the American contention the tribunal declared that there was no evidence that the doctrine of international servitudes was one with which either American or British statesmen were conversant in 1818. A servitude in international law, it added, "predicates an express grant of a sovereign right and involves an analogy to the relation of a *prædium dominans* and a *prædium serviens*, whereas by the treaty of 1818 one state granted a liberty to fish, which was not a sovereign right, but a purely economic right, to the inhabitants of another state." The doctrine of international servitudes in the sense which American counsel sought to attribute to it, the tribunal continued, "originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire—and was little suited to the principle of sovereignty which prevails in states under a system of constitutional government such as Great Britain and the United States and to the present international relations of sovereign states and has found little, if any support from modern publicists."<sup>1</sup> The decision in so far as it denied that there had been an abandonment of sovereignty by Great Britain to the United States would seem to have been entirely sound. What had been conceded was a grant or favor, not a right of sovereignty. But certain observations of the tribunal regarding the doctrine of international servitudes have met with some criticism.<sup>2</sup>

<sup>1</sup> Scott, *Hague Court Reports*, p. 160.

<sup>2</sup> For example by Oppenheim (*International Law*, 3d ed, Vol. I, pp. 365-6) who remarks that the statement that the doctrine having originated in the peculiar conditions of the Holy Roman Empire was unsuitable to modern conditions, and that the claim that a servitude predicates an express grant of a sovereign right, were based on no other authority than the contention of the United States.

## INTERNATIONAL LAW

Whatever may be the merits of the tribunal's reasoning its decision will undoubtedly tend to eliminate from international law the doctrine of international servitudes as it has been previously understood and advocated by many text writers. As such, it is in line with the modern tendency among publicists which is away from this type of limitation upon national sovereignty.<sup>1</sup> But after all the importance of the decision consisted not so much in the points of international law which it decided as in the fact that it settled in a peaceful manner a century old irritating dispute between two great powers.

The Orinoco Steamship case, the eighth decided by the Hague tribunal, involved the question whether in case the umpire in an arbitral proceeding exceeds his powers and bases his decision on errors of law and fact the award is open to revision. In this respect it bears some resemblance to the Pious Fund case. The Venezuelan government having canceled in 1901 a concession previously granted to a corporation the majority of whose stock was held by American citizens, the controversy to which it gave rise was referred to a mixed commission in 1903, the umpire of which, Dr. Barge, rendered an award in favor of the claimants. Although the protocol for the arbitration of the claim provided that the award should be final and conclusive it was protested against by the United States on the ground that it disregarded the terms of the protocol and was based on errors of both law and fact which invalidated it. The demand of the United States for a revision of the award was by mutual agreement of the parties referred in 1909 to a tribunal chosen from the Hague panel. The tribunal held,

<sup>1</sup> Compare Lansing, "The North Atlantic Coast Fisheries Arbitration," 5 *Amer. Jour. of Int. Law*, p. 14. See also Anderson, "The Final Outcome of the Fisheries Arbitration," *ibid*, Vol. 7, pp. 1 ff.; Drago, *Un Triomphe de l'Arbitrage*, in 19 *Revue Générale de Droit Int. Pub.*, pp. 5 ff.; Basdevant, *L'Affaire des Pêcheries entre les Etats Unis et la Grande Bretagne*, *ibid*, Vol. 19, pp. 421 ff.; Balcs, in 13 *Revue de Droit Int.*, pp. 5 ff., and de Louter, *ibid*, pp. 131 ff.

that, as a general principle, the award of an arbitral commission should be "accepted, respected and carried out without any reservation as it is laid down by article 81 of the Hague Convention of 1907, since no provision had been made for reconsidering awards." Nevertheless, since the parties in the present case had admitted in the agreement of submission that excess of jurisdiction and material errors invalidated an arbitral award and had called upon the tribunal to decide whether the decision of umpire Barge was not void and whether, if so, his decision was open to revision, the tribunal was fully competent to re-examine the matter. This it accordingly did, sustaining the decision of the umpire in part and revising it in other respects by making a new award.<sup>1</sup> Thus for the first time, as the agent of the United States remarked, the judgment of an international tribunal had been annulled and revised by the decision of a second international tribunal.

The ninth case—that of Savarkar—arose out of a trivial incident—the escape of an Indian student from a British vessel in the French port of Marseilles, while he was being transported from England to India for trial. After his escape from the vessel he was arrested by a French policeman who delivered him over to the captain of the ship. Subsequently the French government demanded his restitution on the ground that his surrender to the captain of the British vessel was in violation of the rules of international law. The British government refusing to comply with the demand, the two governments agreed to submit the question to the Hague tribunal (1910), which decided that while an irregularity had been committed by the arrest of the fugitive and his delivery to the British captain there had not been, under the circumstances, any violation of the sovereignty of France and there was no rule of

<sup>1</sup> See a learned article by W. C. Dennis entitled the "Orinoco Steamship Company Case" in 5 *Amer. Jour. of Int. Law*, pp. 35 ff., where the details of the case are fully discussed. See also an article by M. Scelle in 18 *Revue Générale*, pp. 164 ff.

international law which required the restitution of a fugitive who had been arrested under the circumstances in which Savarkar had been seized. From the standpoint of strict legal theory the contention of France had much to support it, but practical considerations of comity and justice were against it. The strict application of the French view would seriously interfere with the extradition of fugitives from justice, which should be facilitated rather than hindered by overstrict insistence upon respect for national sovereignty. In this case, as in the preceding, the decision was in some measure a compromise, it was based on considerations outside the strictly legal question involved and it represented the conclusion of an arbitral tribunal not obliged to apply strict legal principles, rather than that of a court of justice which has less latitude in reaching its decisions.<sup>1</sup>

The tenth case—that of Canevaro—was the outgrowth of a dispute between Italy and Peru involving the liability of the Peruvian government to pay certain drafts held by the Canevaro brothers and drawn by the Peruvian government to the order of Canevaro and Sons. The tribunal was called upon to decide, first of all, as to the nationality of Canevaro and this involved a full consideration of the whole matter of double nationality resulting from the conflicting rules of *jus soli* and *jus sanguinis*. The tribunal held that an individual may possess in fact two nationalities and that Canevaro in fact did; one, Peruvian, resulting from his birth in Peru, and another, Italian, as the child of an Italian father, but that for the purposes of the case in question he had elected Peruvian citizenship. An incidental question involved was whether foreign creditors have a right to more favored treatment than nationals. Certain bonds of the Peruvian government, reduced in value by the refunding of the

<sup>1</sup> Compare Barclay, *New Methods of Adjusting International Disputes*, p. 82. But the decision is criticized by Robin in an article in 18 *Revue Générale*, pp. 303 ff.

debt, had passed into the hands of Italian subjects who had suffered losses resulting therefrom. Italy claimed that the Peruvian government was liable for these losses but the tribunal held that the transfer of the bonds of an internal debt from nationals to aliens conferred no greater rights upon the latter than upon the former.<sup>1</sup> Foreigners and nationals were, in short, on a footing of absolute equality and there was no rule of international law which required the debtor state to indemnify foreigners who had sustained losses in consequence of the depreciation of the debt.

The eleventh case involved a claim on the part of Russia for arrears of interest on an indemnity payable by Turkey on account of damages sustained by Russian subjects in Turkey during the War of 1877-78. The arbitrators admitted, in principle, the liability of Turkey for the accrued interest on the delayed payments but held that in the present case Russia had in effect renounced her claim for interest by repeatedly accepting instalments of the principal in which no interest was included and without making any reserve as to the non-inclusion of interest.<sup>2</sup>

The twelfth case—that of the *Carthage* (1913)—arose out of the seizure of a French steamer by an Italian war vessel during the Turko-Italian war in 1912 and the conveyance of the vessel to Cagliari where it was detained for some time. The vessel was seized on the ground that it had on board an aeroplane destined to a private consignee in Tunis, but which the Italians claimed was contraband of war intended for the Turkish military authorities. The French government demanded reparation for what it considered an insult to the French flag; also

<sup>1</sup> See the comments of Borchard, *Diplomatic Protection of Citizens Abroad*, p. 311, n. 3, and p. 324. A full and very learned article on the Canevaro case by Prof. Chas. De Boeck may be found in 20 *Revue Générale* (1912), pp. 317 ff. See also an editorial in 6 *Amer. Jour.*, 709.

<sup>2</sup> Barclay, *op. cit.*, p. 83, criticizes the award as "unsatisfactory" and "self-contradictory." See a full discussion of the case by Ruzé in 45 *Rev. de Droit Int. et de Lég. Comp.*, pp. 351 ff.



damages, for the losses sustained by the owner of the vessel. Not being able to settle the controversy through diplomacy the two governments submitted the matter to a tribunal chosen from the Hague panel. The tribunal affirmed the right of belligerents as a general rule to visit and search neutral merchant vessels to ascertain if they have contraband aboard but held that the legality of acts committed *after* search depends upon the presence of contraband or the existence of sufficient legal reasons to justify the suspicion that it is present. In the present case the information which the Italian authorities possessed was too general in character and had too little relation to the aeroplane to justify a reasonable belief in its hostile destination and therefore to justify the seizure and detention of the vessel. The action of the Italian authorities was therefore illegal and the Italian government was condemned to pay to the government of the French Republic 160,000 francs to cover the losses sustained by the private parties interested in the vessel. The tribunal, however, refused to comply with the demand of the French government that it be awarded the sum of one franc as reparation for the alleged insult to the French flag.

The case of the *Manouba*, referred to the same arbitrators and decided on the same date, also involved the question of the legality of the seizure and detention by the Italian authorities of a French vessel during the Turko-Italian war. In this case, however, it was the transportation of Ottoman subjects who claimed to be engaged in the Red Crescent service, but whom the Italian authorities suspected of being military persons which caused the Italian cruiser to seize and detain the *Manouba*. The French government demanded the release of the Turks and reparation for the offense to the French flag. The tribunal held that there was a misunderstanding between the two governments regarding the exemption of the vessel from search and that in the absence of a special understanding the Italian naval authorities were justified in searching it since they believed that some of the passengers were Turkish soldiers, but

that they had no right to capture it and take it to Cagliari. But although these acts were illegal they did not affect the right of the Italians to compel the surrender of the Turks and to detain the vessel until they were so surrendered. These latter acts were therefore legal. The Italian government was condemned to pay the French government 4000 francs for losses and damages sustained by reason of the capture and detention of the vessel but the tribunal refused to award the one franc demanded by the French government for an offense against the French flag.

The fourteenth case (1914) involved a rather unimportant boundary dispute between the Netherlands and Portugal which the two governments had been unable to settle by diplomacy. After a lengthy diplomatic correspondence the question was referred to M. Lardy, Swiss Minister to France, as arbitrator with authority to decide the case on the basis of the treaties in force between the two countries and on the basis of the "general principles of international law." His award sustained the claim of the Netherlands, which he maintained, represented the intention of the parties as they were expressed in the negotiations of 1902 and the convention of 1904.<sup>1</sup>

The fifteenth case, involved a dispute between Great Britain, France, and Spain, on the one hand, and Portugal, on the other, concerning the claims of British, French, and Spanish nationals on account of the expropriation of their property by the Portuguese government following the establishment of the Republic in 1910. By a *compromis* dated July 31, 1913, the parties agreed to refer the matter to a tribunal of three arbitrators (Lohman of the Netherlands, Lardy of Switzerland, and Root of the U. S.) all of whom were "strangers" to the controversy. They were to decide the case "in accordance with the conventional rights applicable thereto, or, that failing, according to the general

<sup>1</sup> See 23 *Rev. Gén.*, pp. 89 ff. for a discussion of the decision.

provisions and principles of law and equity."<sup>1</sup> On September 2, 1920, the tribunal rendered awards in favor of the British and French claims and two days later it rendered 19 different awards disposing of the Spanish claims.<sup>2</sup> It appears that the British and French governments had already before the meeting of the tribunal reached a virtual agreement with the Portuguese government regarding the form and nature of the decision but they allowed the case to go to the tribunal where the settlements were given the form of awards.<sup>3</sup>

The sixteenth case was that involving certain long-standing claims of a French company against the Government of Peru. By a *compromis* signed on February 2, 1914, the two governments agreed to refer the claim to the decision of three arbitrators under the summary procedure provisions of the Hague Convention of 1907 and in October 11, 1921, an award was made sustaining, in the main, the claims of the French party.<sup>4</sup>

The seventeenth and last case referred to the Hague court was one between Norway and the United States involving the claims of certain Norwegian shipowners whose contracts had been requisitioned by the United States Shipping Board during the World War. A dispute having arisen between the owners and the Board as to the amount of compensation to be paid for the contracts and it being impossible to settle the matter by direct negotiation, the two governments agreed to submit the controversy to arbitration. By the terms of the *compromis* signed on June 30, 1921 each government chose one of its own nationals as arbitrator and not being able to agree upon a third member they requested the President of the Swiss Confederation to choose him. Dr. Huber, a Swiss jurist was chosen.<sup>5</sup>

<sup>1</sup> Text of the *compromis* in 8 *Amer. Jour. of Int. Law*, supp. p. 165. See also an editorial in *ibid*, pp. 339-40.

<sup>2</sup> Texts of the awards in 15 *Amer. Jour. of Int. Law*, pp. 99 ff.

<sup>3</sup> *Scott, ibid*, p. 74.

<sup>4</sup> Texts of the award in 16 *Amer. Jour.*, pp. 480 ff.

<sup>5</sup> The main facts regarding the controversy are explained in an editorial, *ibid*, pp. 81-84 and in the *New York Times* of July 29, 1922, p. 2.

The tribunal rendered its award in October, 1922, sustaining in the main the claims of the Norwegian owners. Against the decision the American arbitrator protested.

Such is the record of achievement of the Hague Permanent Court of Arbitration during the 20 years that have elapsed since it rendered its first award in 1902. The settlement of 17 cases, in only three of which there were dissenting opinions by arbitrators, is an achievement which abundantly justified the establishment of the court. Some of the cases—perhaps the majority of them—were relatively unimportant but several involved grave and delicate questions for the settlement of which all the resources of diplomacy had been exhausted without success. Some were of long standing, some arose at a time when the relations between the parties were more or less strained and it is not improbable that their submission to the Court prevented a resort to arms; a few of them (*e. g.*, those of the *Casablanca*, the *Carthage*, and the *Manouba*) involved what one of the parties regarded as its vital interests and national honor. In several cases the award was based rather upon compromise than upon strict legal principles, but in no case was the decision the object of official protest or of a demand for revision on the part of the losing party. The fact that the award in every case was duly executed by the losing party proves that good faith and the sense of national honor are sanctions sufficiently effective to insure compliance with the decisions of the tribunal. Regret has been expressed that states have not had more frequent recourse to the court so that the world might have been spared some of the wars that have afflicted mankind since the establishment of the court, but in view of the present somewhat exaggerated conceptions which prevail regarding the vital interests and national honor of states and the feeling that arbitral tribunals cannot always be depended upon to render impartial and exact justice, it could hardly be expected that all disputes should have been taken to the court. The court, it may be remarked has not

been replaced by the new permanent court of international justice set up in accordance with the League of Nations Covenant; it still remains in existence so far as it has ever had an actual existence; and it may be assumed that some states will in the future prefer to resort to it rather than to the new court, for the reason that the parties to each case are allowed to choose their own judges, whereas they will have no such right in case of recourse to the permanent court of international justice.

The settlements effected through the agency of the Hague Permanent Court of arbitration by no means represent the total achievements which must be placed to the credit of arbitration since the establishment of the court. Since that date, in fact, there have been approximately 200 cases of arbitration by mixed commissions and other bodies.<sup>1</sup> During the first three years of the present century there were some 50 such cases.<sup>2</sup> The controversies thus settled related to boundaries, claims for damages on account of injuries and other pecuniary claims, annulment of concessions, seizure of property, liquidation of debts, non-execution of contracts, and the like. Most of these cases were referred to mixed commissions; in a good many instances, to the head of a disinterested state and in some cases to a private individual or some minister of state as arbitrator. In the year 1903 ten mixed commissions consisting of two arbitrators selected by the parties and an umpire selected by a third party (President Roosevelt, the Queen of the Netherlands or the King of Spain) passed upon the claims of Great Britain, Germany, Italy, the United States, France, Spain, Belgium, the

<sup>1</sup> This is the estimate given in the *World Peace Foundation* pamphlet, "Historical Light on the League to enforce Peace," Vol. VI (1916), No. 6, p. 8.

<sup>2</sup> Darby, in his *International Tribunals* (pp. 900 ff.), gives a summary of 63 cases settled during the years 1900-1904. Not all of them however, were cases of arbitration in the strict sense of the term, a number being merely delimitations by joint commissions of boundary lines. A very incomplete list of cases between 1900 and 1910 is published in 19, *Revue Générale*, p. 256.

Netherlands, Norway, Sweden, and Mexico against Venezuela. In the same year occurred the important case between Great Britain and the United States involving a dispute as to the boundary between Canada and Alaska. The tribunal consisted of six "impartial jurists" appointed "equally and jointly" by the parties. As finally constituted it was composed of two jurists of the United States, two Canadian members and Lord Alverstone, the Lord Chief Justice of England. The award sustained, for the most part, the claims of the United States and while it gave rise to some dissatisfaction in Canada it was duly accepted and faithfully executed.

Passing over, for lack of space, many cases that were settled by arbitration during the ensuing years we may call attention to several of the more important ones. One such was the case of the British American pecuniary claims settled by arbitration in 1910. Hundreds of claims (aggregating about \$4,000,000) by private persons had been filed at various times either in the British Foreign office or with the department of State at Washington—claims relating to losses on account of interference with the exercise of fishery rights, shipping claims, claims in respect to property rights, collection of customs duties, naval and military operations, government contracts, etc. Under a special agreement signed August 18, 1910<sup>1</sup> Great Britain and the United States referred these claims to a commission composed of two arbitrators—one appointed by each of the parties, and an umpire selected by the arbitrators. The tribunal held its sessions in Washington and Ottawa and in due course rendered awards in all the cases submitted to it.<sup>2</sup>

In the following year a long pending boundary dispute between the United States and Mexico involving title to about

<sup>1</sup> Text in 5 *Amer. Jour. of Int. Law*, supp., pp. 257 ff.

<sup>2</sup> As to the character of the claims involved and other facts regarding the arbitration see the *Amer. Jour. of Int. Law*, Vol. 5, pp. 1033 ff. and Vol. 7, pp. 577 ff. The texts of the awards may be found in *ibid*, Vol. 7, pp. 875 ff. and Vol. 8, pp. 663 ff.

600 acres of land geographically within the city of El Paso, Texas, was referred to the joint commission of two persons, to whom was added a third commissioner as umpire and who by agreement was to be a Canadian jurist.<sup>1</sup> The main question involved related to the effect upon the boundary line, of changes in the bed of the Rio Grande river, and particularly whether the changes occurring since 1852 had been the result of slow and gradual erosion and deposit of alluvium in the sense of the treaty, as the United States contended, or whether they resulted from sudden and violent action of the river, as Mexico claimed. The umpire held that the changes in the bed of the river between 1852 and 1864 were the result of slow and gradual erosion but that the changes subsequent to the latter date were not of this character. Consequently, a part of the tract in question should be awarded to Mexico. The American commissioner, however, filed a vigorous dissenting opinion from that part of the award which divided the tract, this mainly on the ground that it lay beyond the jurisdiction of the commission, since the agreement for arbitration authorized the commission to determine the title to the tract as a whole and not to divide it. It may be remarked also that the Mexican commissioner dissented from those parts of the decision which were adverse to the claims of his own country. The attitude of both the American and Mexican commissioners furnished further evidence of the undesirability of referring international disputes to commissions composed in part of the nationals of the litigating countries.<sup>2</sup>

<sup>1</sup> As to the facts and history of the dispute, see *Amer. Jour. of Int. Law*, Vol. 4, pp. 925 ff., and Vol. 5, pp. 709 ff. Text of the award in 5 *ibid.*, pp. 782 ff.

<sup>2</sup> Two other recent cases of arbitration for the settlement of boundary disputes were those between Bolivia and Peru (1919) and between Costa Rica and Panama in 1914. The former was referred to the government of the Argentine Republic whose award was not satisfactory to Bolivia but which was finally accepted as conclusive. 3 *Americin Jour. of Int. Law*, pp. 949 ff. The case between Costa Rica and

In the same year (1911) a quarter century old dispute between Colombia and Italy was settled by arbitration. This was the Cerruti affair, the origin of which dated back to the year 1885, when a revolution broke out in Colombia during which Cerruti, an Italian subject, was accused of unneutral conduct and his property and that of his firm was confiscated. Intricate questions both of fact and law were involved in his claims for reparations : whether he had forfeited his right to protection by participation in the revolution ; whether, if he were guilty, the property of his firm was liable to confiscation ; whether the status of his firm though a Colombian corporation was determined by the law of its domicile or by Italian law in consequence of Cerruti's nationality, etc. The case led to the severance of diplomatic relations between the two countries more than once and on two occasions Italian warships appeared in Colombian waters and compelled compliance with the demands of the Italian government. The case was once referred without success to the mediation of Spain, again to a mixed commission and again in 1897 to the President of the United States, Mr. Cleveland. The President's award was in favor of Italy ; the Colombian government was willing to accept parts of it although it insisted upon a revision by the arbitrator ; against other parts of it the Colombian government protested vigorously on various grounds and refused to accept and execute the award. Finally, in 1911 the parties agreed to try arbitration again and the matter was referred to a tribunal composed of an arbitrator appointed by each party and an umpire selected by the arbitrators. As constituted the tribunal was composed of a Chilean, an Italian and

Panama was referred to the Chief Justice of the U. S. Supreme Court (White) who made his award in 1914. Panama refused to accept the award on the alleged ground that the arbitrator had exceeded his jurisdiction. In view of the special relations between the United States and Panama under the treaty of 1903, pressure was effectively brought to bear upon Panama to compel her to comply with the award, 15 *Amer. Jour. of Int. Law*, pp. 236-240.



a Norwegian jurist; it met at Rome in June, 1911 and on July 6 rendered a unanimous award sustaining in part, but not wholly, the claims of Italy in behalf of Cerruti. The award appears to have been in the nature of a compromise; in fact, the commission was apparently authorized to compromise the case since it was charged with deciding it according to "equity."<sup>1</sup> The award appears to have been accepted and executed by the Colombian government thus ending a long, irritating and complicated dispute which had nearly involved the two countries in war.

The same year which saw the settlement of this affair a mixed commission composed of a Nicaraguan jurist, a citizen of the United States, and a Porto Rican judge was constituted by the Nicaraguan government, upon the advice of the government of the United States, to hear and determine a large number of domestic and foreign claims against Nicaragua. Nearly 8000 claims by nationals of Nicaragua and 24 foreign countries, aggregating nearly 14,000,000 dollars, were filed with the commission and during the several years of its existence it disposed of them all, making awards totalling \$1,840,432.<sup>2</sup> Finally, in 1922 the governments of Chile and Peru agreed to settle by arbitration their long-standing boundary dispute concerning the Tacnos-Arica area, which if it results in success will constitute one of the most signal triumphs of arbitration ever known.

It is manifestly not possible in this lecture to review the many cases of arbitration or quasi-arbitration that have taken place since the beginning of the present century. The number has gone on increasing with the passing years so that it may be

<sup>1</sup> See an editorial in 6 *Amer. Jour. of Int. Law*, pp. 965, where the history of the case is summarized. Text of the award and other documents, *ibid*, pp. 1003 ff. See also Darras in the *Revue Générale de Droit Int. Public*, 1889, pp. 533 ff.; and Pierantoni in 30 *Rev. de Droit Int. et de Lég Comparée*, pp. 445 ff.

<sup>2</sup> See an article by Judge Schoenich, a member of the commission, in 9 *Amer. Jour. of Int. Law*, pp. 858 ff.

said that this method of settling certain classes of disputes and particularly those involving claims of a pecuniary nature has tended more and more to become an international habit.

Parallel with this increasing practice has been the negotiation of arbitration treaties between the different states of the world. As has been pointed out, many treaties containing arbitral clauses were concluded during the nineteenth century; the twentieth century has seen a remarkable extension of the policy, in the form of arbitration treaties; that is to say, arbitral clauses have expanded into treaties of arbitration. In 1902, 11 such treaties were concluded; in 1903, 4; in 1905, 21; in 1906, 3; in 1907, 4; in 1908, 22; in 1909, 32; in 1910, 18; in 1911, 13, and so on. When the European War broke out in 1914 there were either in force or expected to come into force, 229 arbitration treaties of which more than 160 had been concluded since the beginning of the twentieth century.<sup>1</sup> The Argentine Republic had such treaties with 19 countries; Brazil with 33 countries; France with 16 countries; Great Britain with 17; Italy with 25; Peru with 17; Portugal with 18; Salvador with 20; Spain with 31; The United States with 28, etc.<sup>2</sup> Thus in 1914 almost the entire world was bound together by a veritable network of arbitration engagements. It is significant that Germany stood alone among the states in having no such treaties, its single treaty (with Great Britain) having expired on July 1, 1914, a month before the outbreak of the war.<sup>3</sup> Several Latin American and European Republics had gone even to the length of embodying arbitration engagements in their constitutions. Thus the Constitution of Venezuela (1904, Art. 120) contained

<sup>1</sup> See table in *World Peace Foundation Pamphlet*, entitled "Arbitration Engagements," Vol. 5 (1915), No. 5, Part 3, p. 30.

<sup>2</sup> See the lists, *ibid*, pp. 1 ff.; also pamphlet No. 6, Vol. VI (1916) p. 9.

<sup>3</sup> Austria-Hungary, having been a party to only two treaties (one with Great Britain and one with Portugal) was almost in the same category with Germany.

a provision that "in all international treaties a clause shall be inserted to the effect that all differences between the contracting parties shall be decided by arbitration without appeal to war." The Constitution of the Dominican Republic (1908, Art. 102) contained a similar clause and the constitution of Portugal (1911, Art. 73) recognized "the principle of arbitration as the best method of resolving international questions" and made it the duty of the chief executive to attempt recourse to arbitration before declaring war (Art. 26).<sup>1</sup> It may also be remarked that several of the conventions establishing international administrative unions provide that disputes relative to the interpretation of such conventions shall be settled by arbitration. Such are the conventions of 1890 relative to the railway freight union (Art. 57, Sec. 3) and the suppression of the slave trade (Arts. 54-55); the convention of 1906 relative to the postal union (Art. 23); the convention of the same year relative to radio-telegraphy (Art. 18) and the convention of 1912 relative to the same subject (Art. 111).

The majority of the treaties of arbitration, however, have contained reservations as to certain types of disputes, the most general being those involving the vital interests, independence or national honor of the contracting parties and those affecting the interests of third parties. Such disputes have been excluded from the obligation to arbitrate, by reservations contained in 46 of the more than 200 treaties in force at the time of the outbreak of the Great War. A common type of treaty is that which binds the parties to arbitrate differences of a legal nature

<sup>1</sup> The Latin American States, it may be observed in this connection, have shown special interest in the subject of arbitration. They have entered into many treaties of arbitration with European states and have by general treaties among themselves declared arbitration to be a "principle of American public law." See Qesada's *Arbitration in Latin America*; an article by Alvarez entitled "Latin America and International Law" in 3 *Amer. Jour.*, pp. 269-353; an address by W. A. Penfield, entitled "The Attitude of American Countries Toward Arbitration," in *Procs. of Amer. of Soc. of Int. Law*, 1915, pp. 40 ff., and an address by J. H. Ralston on the same subject, *ibid*, pp. 54 ff.

or those relating to the interpretation of treaties between the contracting parties which it has not been possible to settle by diplomacy, subject to the exceptions mentioned above in regard to vital interests, national honor, etc. Other treaties, quite numerous, especially those of a commercial character, specify certain categories of disputes arising under the treaties themselves, which the parties agree to submit to arbitration. A few of the smaller states have gone to the length of entering into treaties by which they agree to arbitrate *all* disputes of whatever character which may arise between them and which they have not been able to settle by diplomacy. Such was the treaty of 1898 between Argentina and Italy; that of 1901 between Bolivia and Peru; that of 1902 between Argentina and Chile; that between Denmark and the Netherlands (1904); between Denmark and Italy (1905); Denmark and Portugal (1907); Italy and the Netherlands (1907); Great Britain and Uruguay (1918); and Poland and Czecho-Slovakia (1921). By a treaty of 1905 between Colombia and Ecuador the contracting parties engaged that they would never appeal to arms as between themselves until they had attempted to settle their controversies by negotiation and arbitration. By the convention of 1907 between the five central American states providing for the creation of a Central American Union, they agreed to submit to the court established by the convention all differences of whatever nature arising between them. By a treaty of June 7, 1920 between Austria and Czecho-Slovakia the parties agree to establish a permanent court of arbitration for the settlement of their controversies. The court is to be composed of two arbitrators appointed by each government and a fifth member chosen by the arbitrators, and is to sit alternately at Vienna and Prague.<sup>1</sup>

In the United States where the sentiment in favor of arbitration has always been strong and where recourse to this

<sup>1</sup> Text in Treaty Series, League of Nations (1921), No. 3, p. 220.

mode of settling differences has been frequent, differences between the President and the Senate regarding their respective constitutional powers in the making of treaties has sometimes proved an obstacle to the successful conclusion of arbitration engagements. In 1904 the Secretary of State, Mr. Hay, negotiated a number of treaties of arbitration with foreign governments but as they provided that the *compromis* for the submission of each specific case to arbitration should be concluded by the President without the advice and consent of the Senate, the Senate amended the treaties so as to make the *compromis* dependent upon its approval. The amendments being unacceptable to the President he declined to pursue the negotiations further.<sup>1</sup> In 1908, Mr. Root, then Secretary of State, negotiated no less than 12 similar treaties with foreign governments but as they expressly reserved the right of the Senate to pass upon the *compromis* their ratification was duly consented to by the Senate and they came into operation.<sup>2</sup>

President Taft in 1911 encountered the opposition of the Senate in his effort to conclude a series of arbitration treaties in which the usual exceptions as to vital interests, national honor, etc., should be omitted. Under his instructions the Secretary of State, Mr. Knox, negotiated treaties of this character with Great Britain and France which were intended to serve as models of treaties to be concluded with foreign powers generally.<sup>3</sup> In these treaties a distinction was made between those disputes which are "justiciable" in their nature

<sup>1</sup> As to the merits of the controversy between the President and the Senate, see 2 *Amer. Jour. of Int. Law* (1908), pp. 387-390.

<sup>2</sup> *Ibid*, pp. 624-630.

<sup>3</sup> Senator Root in advocating the ratification of the treaties pointed out that their value would not consist so much in preventing war between the parties, because there was little likelihood of hostilities between them, but rather in the moral effect which they would have upon the world and the impetus which it would give to the conclusion of similar treaties between nations which were more likely to

by reason of being "susceptible of decision by the application of the principles of law or equity," and those which are not. The former were considered to be eminently suitable for arbitration and the draft treaties provided that they should be submitted to arbitration without any reservations as to vital interests or national honor.<sup>1</sup> The treaties further provided that in case a question should arise between the parties as to whether a dispute was justiciable or not, it should be referred to a joint commission for consideration and report. The majority of the Senate committee on foreign relations interpreted this provision to mean that the decision of the joint commission would be final and binding upon the parties and that if it found the controversy to be justiciable it would have to be arbitrated, although the Secretary of State maintained the opposite view. They were willing to have the United States enter into a treaty for the compulsory arbitration of justiciable questions without the usual exceptions as to vital interests or honor but were unwilling to place in the hands of a joint commission the final decision as to what disputes were justiciable. That would be a surrender of the constitutional power of the Senate in respect to the conduct of foreign relations. The

be exposed to wars. It would, he said, be a great step forward for the education of mankind along the lines of civilisation. *Cong. Record*, Vol. 48, p. 3050.

<sup>1</sup> Unfortunately there is no exact test for determining between justiciable and non-justiciable disputes. Not infrequently both questions of law and policy are so intermixed in the same case that it is neither wholly justiciable or non-justiciable. Judge Jelf, Master of the British Supreme Court, in an address before the Grotius Society in 1921 (*Transactions*, pp. 59 ff.) attempted to differentiate between the two classes of disputes. First he stated some of the criteria which do *not* serve to differentiate them. He agreed with Mr. Taft that justiciable issues are those which can be decided on "principles of law and equity," if only "equity" was interpreted to mean what Aristotle conceived it to be, namely, "a correction of law where it fails through its generality" rather than what the chancery judges understand it to be. In other words equity in this sense is "that which the parties who framed the case would have intended had they foreseen the exact case." (*Ibid*, p. 65.)

majority of the committee, therefore, recommended the ratification of the treaties subject to the condition that the provision relative to the reference of the question of justiciability of disputes to a joint commission be omitted. A minority of the committee, which included Senator Root, however, urged their ratification. "We see no obstacle," they said, "to the submission of such a question to decision just as any other question of fact or mixed fact and law, may be submitted to decision. Such a submission is not delegating to a commission the power to say what shall be arbitrated; it is merely empowering the commission to find whether the particular case is one that the President and Senate have said shall be arbitrated.<sup>1</sup> No further action was taken on the treaties and they were dropped. The friends of arbitration considered the conclusion of the treaties to be a notable achievement and the disappointment over the inaction of the Senate was keen and widespread. These treaties represented a step in the direction of eliminating from the category of non-arbitrable disputes controversies affecting the so-called "vital interests," "independence," and "national honor," of the parties. These expressions are extremely vague and elastic; they are "empty phrases," and there is no juristic test or standard for determining what they mean. In the last analysis they mean whatever one of the parties may choose to make them mean. In the hands of an unskilled diplomat, as Sir Thomas Barclay observes, every question can become one of national honor and very often what is called "national honor" is merely a one-sided view of a question in which "honor" plays very little part.<sup>2</sup> The

<sup>1</sup> As to the controversy see Dennis, "The Arbitration Treaties and the Senate Amendments," 6 *Amer. Jour. of Int. Law* (1912), pp. 614 ff.; also editorial, *ibid.*, pp. 451 ff.; and International Conciliation pamphlet "The General Arbitration Treaties of 1911." No. 48 (1911). Also John Bassett Moore in the *Independent* of August 17, 1911 and S. E. Baldwin, *ibid.*, August 31, 1911.

<sup>2</sup> *New Methods of Adjusting International Disputes*, p. 60. Sir Thomas suggested in 1907 (*Problems of Int. Practice and Diplomacy*,

exception of "national honor," the late Lord Bryce once remarked, is of very doubtful merit because they are often just the questions which most need to be referred to arbitration inasmuch as they are those which a nation finds it hard to recede from when it has once taken up a position, so that the friendly intervention of a third party is especially valuable.<sup>1</sup> The case of the *Creole* was supposed to have involved a question of honor and so were the cases of the *Casablanca*, the Venezuelan boundary, the Dogger Bank, and the North Atlantic Fisheries but they were nevertheless settled by arbitration to the entire satisfaction of the parties. When the United States first proposed to settle the Alabama claims controversy by arbitration Lord John Russell rejected the proposal on the ground that it involved "the honor of Her Majesty's government" of which that government was "the sole guardian,"<sup>2</sup> but a few years later his successor agreed to arbitrate the controversy. Even the arbitration of disputes between states regarding their boundaries has sometimes been refused by one party on the ground that it would involve the integrity and safety of the country.<sup>3</sup>

President Taft was one of the increasing number of jurists who believe that the time has come when states should bind

p. 145) that both "vital interests" and "national honor" might be replaced by the words: "not affecting the internal laws or institutions or independence or territorial integrity of either contracting state."

<sup>1</sup> Quoted by Foster in his *Arbitration and the Hague Court*, p. 53. Compare also the address of Mr. Jackson Ralston in *Proc. Am. Soc. of Int. Law* (1915), p. 56, who aptly remarks that "there is no imaginable question which may not be declared by one nation or the other to involve its honor, its independence or its vital interests." For an examination of the various interpretations that have been placed upon the term "national honor" see a book by Mr. Leo Perla entitled *What is National Honor?* (1918.)

<sup>2</sup> "That is a question of honor," said Lord Russell, "which we will never arbitrate, for England's honor can never be made the subject of arbitration."

<sup>3</sup> Such a case was the refusal of the Argentine government to arbitrate its boundary dispute with Uruguay for this reason. See editorial in 1 *Amer. Jour.*, pp. 984 ff.



themselves by treaty to arbitrate all disputes without reserve, which cannot be settled by diplomacy, whether they involve "honor, territory or money."<sup>1</sup> The exclusion of all controversies which may be brought into a category so vaguely defined has greatly limited the scope and usefulness of arbitration and further progress in the future will require the elimination of these exceptions. A beginning has already been made by the several countries mentioned above which have agreed to arbitrate all disputes without exception. Moreover several powers which are parties to treaties containing the usual reservations in respect to "vital interests" and "national honor" have agreed that in case a difference should arise between them as to whether a particular dispute involves either, they will arbitrate that question. In at least one treaty (that of 1902 between Guatemala and Spain) it is stipulated that in case such a question arises the "judgment of both nations" shall be necessary to bring the dispute into the category of non-arbitrable controversies. The treaty of 1902 between Mexico and Spain while reserving questions of "national independence and honor" undertakes to enumerate the cases in which neither independence nor honor would be considered as compromised. Those treaties represent steps in the proper direction if the exceptions in respect to vital interests and national honor are to be retained in the future.

The final stage thus far attained in the development of arbitration is found in the obligations created and in the processes provided by the Covenant of the League of Nations.<sup>2</sup> The avowed object of the League of Nations is, in the main, the preservation of peace among its members. Naturally, therefore, arbitration and judicial settlement of international differences

<sup>1</sup> Quoted in 5 *Amer. Jour. of Int. Law*, p. 451. Sir Walter G. Phillimore in his *Three Centuries of Treaties of Peace* (p. 174) advocates the arbitration of all disputes without exception.

<sup>2</sup> It may be remarked in this connection that the treaties of peace of which the Covenant is a part, provided for the creation of *ad hoc* arbitration tribunals for the settlement of certain controversies between any of

occupies a leading place among the methods and instrumentalities which the Covenant creates for the accomplishment of this object. By Article 12, the members of the League agree that "if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council (of the League) and they agree that in no case will they resort to war until three months after the award by the arbitrators or the report by the Council." The same article adds that "in any case under this article the award of the arbitrator shall be made within a reasonable time." Evidently the alternative of arbitration or conciliation is based on the distinction between two different categories of disputes: those which are considered suitable for arbitration and those which are not. Within the first category belongs presumably those disputes which have generally been described by jurists and text writers as "justiciable," that is, those which are capable of being decided by the application of legal rules and principles; within the second category are those of a political character and which may involve questions of national policy to the determination of which strict rules of law are inapplicable. Since the arbitral tribunal and the Council are allowed a period not exceeding six months in which to reach their decision the period of delay supervening may amount to as much as nine months. It was thought that this period of delay, affording as it would, an opportunity for further negotiation, for sober second thought and for the weighing of consequences, might

the allied and associated powers, on the one hand, and the enemy powers, on the other. Thus the treaty of Versailles provided that various questions arising under part X of the treaty, relative to debts, property rights, contracts, prescriptions, judgments, etc., should be referred to mixed arbitral tribunals consisting of three members, one to be appointed by the government of Germany, one by the allied or associated power interested, and the third, by the two governments jointly, or in case of failure to agree, by the council of the League of Nations, or until this was established, by M. Gustave Ador, formerly President of the Swiss Confederation. The arbitrators were required to be nationals of powers that had remained neutral during the World War.

be a means of preventing a resort to war. Unfortunately the value of the arbitration obligation created by the Covenant is seriously diminished by the first clause of Article 13 under which the members of the League "agree that whenever any dispute shall arise between them *which they recognize to be suitable for submission to arbitration*<sup>1</sup> and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject to arbitration. Under this provision the obligation to arbitrate is manifestly dependent upon an agreement between the disputing parties that the controversy is "suitable" for arbitration; they are therefore the sole judges as to whether they are bound to arbitrate the dispute or not. In the last analysis the obligation to arbitrate is entirely voluntary; Mr. Root hardly overstated the matter when he remarked that the members of the League are not obliged to arbitrate any dispute. There is merely an agreement among the parties to arbitrate whenever they are able to agree that a particular dispute is suitable for arbitration. By way of suggestion the covenant mentions several classes of disputes which "are declared to be among those which are generally suitable for submission to arbitration." Such are disputes as to the interpretation of treaties; as to questions of international law, as to the existence of facts which, if established, would constitute breaches of international obligations and as to the extent and nature of the reparation to be made for such breaches. The Covenant might well have established a definite obligation to arbitrate such disputes because they are peculiarly adapted to settlement by arbitration; but instead of this, it limits itself to a mere expression of opinion that they are suitable for arbitration, leaving the parties entire freedom to arbitrate them or not as they choose. It must be admitted that the Covenant in not making the arbitration of such disputes strictly obligatory falls

<sup>1</sup> Italics are mine.

far short of what the advocates of peaceable settlement demand. In reality it represents little if any progress beyond the point already reached in the development of arbitration. There were already at the time some 200 bilateral treaties in force under which the parties had bound themselves to arbitrate the disputes which the Covenant merely suggests as suitable for arbitration; and the obligation is not dependent upon a subsequent agreement that they are suitable for arbitration.<sup>1</sup>

A study of the history and development of arbitration shows that the goal has not yet been attained by any means; a considerable distance remains yet to be travelled before this method of settling disputes will have reached such a state of development that it may be relied upon as an effective preventive of war. Both reason and experience suggest the main lines along which further progress can be achieved. In the first place, the existing bilateral treaties of arbitration should be replaced by a general treaty between the whole body of states. This treaty should create an absolute and definite obligation on the part of the signatory powers to arbitrate all or, at least, certain specified disputes or classes of controver-

<sup>1</sup> Compare the criticism of Mr. Elihu Root in his letter of March 29, 1919 to Hon. W. H. Hays, printed in 13 *Amer. Jour. of Int. Law*, 580 ff. Mr. Root remarks: "The scheme (of the covenant) practically abandons all effort to promote or maintain anything like a system of international law or a system of arbitration or of judicial settlement, through which a nation can assert its legal rights in lieu of war. It is true that Article 13 mentions arbitration and makes the parties agree that whenever a dispute arises 'which they recognize to be suitable for submission to arbitration,' they will submit it to a court 'agreed upon by the parties.' That, however, is merely an agreement to arbitrate 'when the parties choose to arbitrate,' and it is, therefore, no agreement at all. It puts the whole subject of arbitration back where it was twenty-five years ago." Mr. Root adds that "instead of perfecting and putting teeth into the system of arbitration provided for by the Hague conventions it throws those conventions into a scrap heap—it abrogates all the 200 treaties of arbitration by which the nations of the world have bound themselves with one another to submit to arbitration all questions arising under international law or upon the interpretation of treaties." *Ibid*, p. 587.

sies.<sup>1</sup> As Mr. Root has well remarked, the system of purely voluntary arbitration has about reached the limit of its usefulness; if further progress is achieved the system of obligatory arbitration must take its place—obligatory arbitration not necessarily in the sense that one state may at will compel another to come into court and submit to trial on any issue between them, but in the sense that there shall be a binding agreement among states that they will arbitrate all or certain specified disputes according to certain prescribed rules. In the present state of public sentiment, it is hardly likely that a general agreement can be expected, at least for some time, to arbitrate all disputes. There is still a widespread conviction that states cannot safely arbitrate disputes of a political nature which involve their independence or certain interests which they regard as fundamentally vital to their very existence, the arbitration of which would amount to a sacrifice of what they consider their national honor. Yet, as I have pointed out, some states have by treaty agreed to arbitrate such questions and others in the absence of general treaty obligations have in fact referred questions of this kind to arbitration. It may also be remarked that eighteen states which have ratified the statute of the Permanent Court of International Justice have agreed to submit all their disputes to the Court, thus accepting the principle of obligatory recourse to judicial settlement.

Having bound themselves to arbitrate all or certain classes of disputes which by their nature are clearly justiciable it remains to create more satisfactory machinery and processes of arbitration than the existing so-called permanent court at the Hague affords. It will be said that the creation of the new

<sup>1</sup> Compare the remarks of Sir Walter G. Philimore, *Three Centuries of Treaties of Peace*, pp. 175-176, who advocates obligatory arbitration of all disputes without exception. But De Guiter (14 *Rev. Gén.*, p. 298) considers obligatory arbitration to be contradictory to the very nature of arbitration itself. It is difficult, however, to see the force of this argument.

permanent court of justice supplies this want and that, with such a court at hand there will be no further need for recourse to arbitration. But as I have pointed out, some states will still prefer arbitration to judicial settlement because arbitration as generally understood and practised carries with it the right of the parties to choose their own judges, whereas recourse to the permanent court of justice does not. It is a mistake therefore to assume that we are now done with arbitration because we have a judicial court for the settlement of controversies.

There remains the problem of sanctions. It has often been said that the settlement of disputes by arbitration can never be depended upon until some means has been devised for enforcing the execution of awards upon the losing parties. This objection was made at the Hague Peace Conferences and the question was discussed by the committee of jurists which framed the statute of the permanent court of international justice. So long, however, as recourse to arbitration remains optional, states which have voluntarily submitted their disputes to arbitral judgment may generally be depended upon to accept the decision. The sentiment of duty, of honor, a decent respect for the opinions of mankind, will ordinarily prove a sufficient sanction. Few if any civilized states would be willing to incur the obloquy, the odium and the moral isolation which would be visited upon them if, after having voluntarily appealed to arbitration, they should refuse to accept a decision rendered in full accord with the terms of the arbitral agreement.<sup>1</sup> As a well known American jurist who had much experience in connection with arbitration has well remarked, "after all is said

<sup>1</sup> Compare Darby on the questions of sanctions, in his *International Tribunals*, pp. 750 ff., and the opinions there cited; Root, "The Sanctions of International Law," *Procs. Amer. Society of Int. Law*, for 1908, pp. 1 ff.; Dumas, "Sanctions of International Arbitration," in 5 *Amer. Jour. of Int. Law*, pp. 934 ff.; also his work *Les Sanctions de l'Arbitrage International* (Paris, 1905). See also an article in the *Revue de Droit Int.*, Vol. 37, pp. 502 ff. and one by Mr. Geo. A. Finch in 15 *Amer. Jour.*, pp. 28-32.

concerning the execution and enforcement of the awards of international tribunals, the final sanction of international law and arbitration is found in the common international juridical conscience—at bottom the same sanction as that for the rules of private morality, which generally govern men in their jural and extra-jural conduct and relations.” And he adds: “little thought need be given to the theoretical consideration of the question of the sanctions of international law and of arbitral sentences. The rule is—and the exceptions are so rare that they serve conclusively to prove the rule—that states which have voluntarily submitted to international arbitration, do voluntarily observe and execute the award rendered by the tribunal of their own choosing.”<sup>1</sup> Happily, the history of arbitration shows that of the hundreds of cases that have been settled by arbitral methods, there have been very few in which the losing party did not accept the judgment and execute the award. The few exceptions have been cases in which the arbitrators exceeded or were believed to have exceeded their powers or cases in which the award was based upon errors of law or fact, subsequently discovered.

If, however, a general system of obligatory arbitration should be established, such as the advisory committee of jurists which drafted the statute of the permanent court of justice proposed under which an aggrieved state may proceed against another state and obtain a judgment even in the absence of the defendant state, the necessity of some sort of sanction by which the losing party may be compelled to abide by the decision, will naturally be much greater. In that event effective sanctions will not be lacking.<sup>2</sup> The general treaty might very well provide

<sup>1</sup> W. L. Penfield, “International Arbitration,” in 1 *Amer. Jour. of Int. Law*, pp. 339-340.

<sup>2</sup> Dumas discusses in his article cited above and with more detail in his book on the subject, the various sanctions, jural, economic, and military which may be applied to compel the fulfilment of arbitral judgment.

that in case a contracting party declines to arbitrate or to abide by an arbitral judgment the other parties should employ jointly the means at their disposal to maintain the *status quo* between the disputing parties or to enforce the terms of the arbitral judgment.<sup>1</sup> The Covenant of the League of Nations although not establishing a system of obligatory arbitration provides certain sanctions designed to enforce compliance with arbitral awards. Article 13 declares that in the event of any failure to carry out an award the Council of the League shall propose what steps should be taken to give effect thereto and Article 16 provides that if any member resorts to war in disregard of its covenants in respect to arbitration the other members will immediately sever all trade and financial relations with such state, and if this is not sufficient, recourse to military force shall be had to "protect the covenants of the League." Ordinarily such sanctions if fully applied by all the members of the League would prove effective and in most cases the mere knowledge that a covenant-breaking member would be subjected to such treatment would deter it from disregarding an arbitral award.

In concluding this review of the development of arbitration some observations may be made regarding the merits and defects of this method of settling international disputes. Like the system of municipal law for the administration of justice among individuals, international arbitration in the present state of its development is, of course, imperfect. Arbitral decisions have often been criticized on the ground that they were based wholly or in part on compromise. Wehberg, La Fontaine, Dennis, Calvo, De Lauter, Lapradelle, Pillet, Politis and other students of the subject have pointed out instances of this kind. La Fontaine criticized on this ground the award of the Czar of Russia in a claims case between Great Britain and the United

<sup>1</sup> Compare Finch in 15 *Amer. Jour.*, p. 32.



States in 1818.<sup>1</sup> The matter being submitted anew to a mixed commission an award was rendered which likewise was "at bottom only a compromise."<sup>2</sup> The award of Martens in the case of the *Costa Rica Packet* (1897) has been criticized as "anything but a legal decision."<sup>3</sup> The award of the King of Italy in the case of the boundary dispute between Brazil and Great Britain was criticized as being that of a "friendly compositor" rather than of a judge. The Chamizal award in the boundary case between Mexico and the United States in 1911 was criticized as a decision based on compromise.<sup>4</sup> Several of the decisions of the Permanent Court of arbitration have been similarly criticized, notably the cases of the Casa-blanca, the North Atlantic Fisheries and the Orinoco Steamship Company.<sup>5</sup> Still other decisions have been the object of criticism because they were alleged to have been based wholly or in part on compromise.<sup>6</sup>

It may be remarked, however, that this criticism has not always been justified. In some instances the complaint emanated from the losing party or its sympathizers, and in other cases the element of compromise was hardly discernible. In any case, it is a fair question to raise whether the disposition to

<sup>1</sup> See his *Pasicrisie Internationale* (1901).

<sup>2</sup> Lapradelle and Politis, *Recueil*, p. 304.

<sup>3</sup> Wehberg, *Problems of an International Court of Justice*, p. 26.

Professor Pillet criticizes the Court on the ground that "its preoccupation seems to be less to render justice than to discover formulas of conciliation" and that it shows an equal tendency to incline too easily before the *fait accompli*, 23 *Rev. Gén.*, p. 8.

<sup>4</sup> Fauchille, *Rev. Générale*, 1906, p. 139.

<sup>5</sup> Dennis, article "Compromise, the Great Defect of Arbitration," in the *Columbia Law Review*, Vol. 11 (1911), pp. 493 ff. Professor Lammasch, the president of the tribunal in the North Atlantic Fisheries Case, said in an article (*Das Recht*, March 12, 1911) that the award contained "elements of a compromise." See a criticism in 5 *Amer. Jour.*, p. 725, of his admission and his defense, *ibid*, Vol. 6., p. 178. De Lauter (19 *Rev. Gén.*, pp. 291 ff.) criticizes various decisions of arbitration tribunals and especially some of those rendered by the Hague court.

<sup>6</sup> See the review in Wehberg, *op. cit.*, pp. 16 ff.

compromise differences where it is impossible to resolve them by the application of strict legal principles, since there may be none applicable to the dispute, is, after all, a defect. On the contrary, it might be argued that it is an advantage and even a necessary element in the settlement of certain classes of disputes, if they are to be settled peaceably.<sup>1</sup> Finally, it may be remarked that many decisions of municipal courts have not been lacking in which the elements of compromise were present.

Naturally, the system of international arbitration has been criticized because there have been cases which resulted in miscarriages of justice. Among the awards against which allegations of this kind have been made may be mentioned those of the United States and Venezuelan mixed commission of 1866, the Weil and La Abra cases, the Pelletier case, the Lazarre case, the Orinoco Steamship case, and the Fabiana case.<sup>2</sup> It should be said, however, as was said above regarding the complaints in respect to compromise, that these allegations often emanated from the losing party and they were not always well-founded. In some cases also where injustice was generally admitted it resulted from errors and other causes such as frequently occur in the administration of justice by municipal courts. Considering the hundreds of cases that have been arbitrated, the number against which there were reasonably well-founded charges of miscarriages of justice has been remarkably

<sup>1</sup> Compare Dennis, art. cited above, p. 501, and the opinion of M. Bourgeois at the Second Hague Conference, cited by Dennis.

<sup>2</sup> See an article entitled "A Permanent Tribunal of International Arbitration" by Floyd Clarke in 1 *Amer. Jour. of Int. Law*, pp. 342 ff., where these and other cases in which there were alleged miscarriages of justice resulting from fraud, perjury, lack of impartial arbitrators, excess of jurisdiction, etc. The author concludes that "the foregoing examples have been given for the purpose of bringing to the attention of the reader the mistakes, the absurd errors, the gross blunders and the actual corruption amounting to a travesty on justice which have occurred in international arbitrations of private claims under the present system of constituting those courts as occasion arises." The remedy which he suggests is the creation of a permanent court composed of judges having a fixed tenure and fixed salaries (p. 399).

small. An examination of an equal number of the decisions of the municipal courts of any country would doubtless reveal a larger proportion of cases which were open to attack upon similar grounds.

In the last place, the system of international arbitration has been criticized on the ground that it has contributed little or nothing toward the development of international law in the sense that municipal law has been developed by judicial tribunals. Arbitral tribunals, unlike judicial courts, it is said, frequently do not base their decisions upon "respect for law"; they are often influenced by the desire to satisfy the parties instead of by an obligation to apply strictly the rules of law; arbitrators frequently, especially when they are sovereigns, neglect to give the reasons upon which their decisions are based; and more important still, they do not feel bound by the precedents in earlier cases. Decisions involving important questions of international law are never followed in succeeding cases unless they commend themselves to the arbitrators. Under these circumstances there is no continuity of international jurisprudence.<sup>1</sup> This criticism is in part well-founded, but, after all, the principal function of arbitration is to settle international differences and not to develop a body of international law. From the very nature of the case the development of international law must come through other agencies than arbitral tribunals, for the time is not yet ripe for entrusting this important task to such bodies. In any case, the criticism is applicable not so much to the principle of arbitration itself as to the methods employed. The lack of continuity of jurisprudence has resulted from the system of *ad hoc* arbitral tribunals; with a really permanent arbitration court the reasons for the criticism would in large measure disappear. Finally, it may be remarked that arbitral tribunals have in fact generally shown as great

<sup>1</sup> Such is the thesis of Wehberg, *op. cit.*, Ch. 3, and Lapradelle and Politis in their *Recueil*, Introduction, Vol. I.

respect for the well-settled rules of international law as national courts have shown; they have applied those rules in the cases in which they were applicable and while they have not followed strictly the doctrine of *stare decisis* they have frequently quoted and relied upon earlier decisions to support their own conclusions.<sup>1</sup> The truth is, much of the criticism directed against arbitration on the ground that it possesses certain defects which are lacking in a system of "judicial settlement" is unjustified. In reality, the difference between the two modes of settling disputes is by no means as great as some writers have imagined. Apropos of the distinction, an eminent American jurist and authority on the subject has recently observed: "It is said that heretofore we have had arbitration, but that arbitration has failed, and that now we are to have 'judicial settlement' of international disputes. Such statements illustrate the propensity to accept phrases rather than to search for facts—I venture to assert that the decisions of those international tribunals are characterized by about as much consistency, by about as close an application of principles of law, and by perhaps as marked a tendency on the part of one tribunal to quote the authority of tribunals that have preceded it, as one will find in the proceedings of our ordinary judicial tribunals. One cannot study these records without being deeply impressed with that fact, and without discovering how lacking in foundation is the supposition that when we talk of the 'judicial settlement' of international disputes we are presenting some new device or method."<sup>2</sup>

<sup>1</sup> The extent to which this has been done may be seen from a study of Ralston's excellent treatise on *International Law and Arbitral Procedure* (1910). See especially Ch. I. Ralston himself remarks that it is difficult after one has read Moore's *History and Digest of International Arbitrations* to see what judicial characteristic arbitral decisions lack which can be found in the decisions of municipal courts, p. III.

<sup>2</sup> John Bassett Moore, *Proceedings of the Academy of Political Science*, Vol. 7 (1917), No. 2, pp. 21-22.

## LECTURE XI

### Development of other Agencies for the Peaceable Settlement of International Disputes

#### I

#### INTERNATIONAL COMMISSIONS OF INQUIRY.

From arbitration, we pass to a consideration of the development of other methods for the adjustment of differences between states. The more important of these are international commissions of inquiry and the use of good offices and mediation.

A commission of inquiry may be defined as a body instituted by mutual agreement of the parties in controversy for the purpose of investigating the facts at issue and of reporting the results thereof to the parties for their consideration. It is an extra-diplomatic body rather than a court or arbitral tribunal. It may be a joint commission representing the parties, or a mixed commission composed not only of representatives of the parties in disputes but, in addition, of representatives of states which are "strangers" to the controversy; it may be also either an *ad hoc* body created as occasion arises, for some particular case, or it may be a permanent commission always in existence and accessible at all times to states which may desire to have recourse to it. It is distinguishable from a court of justice both in its composition and function and from an arbitrable tribunal in that its competence is ordinarily limited to ascertaining and elucidating the facts and of making recommendations for the further consideration of the parties. Its findings do not take the form either of a judgment or an award. Its function is somewhat analogous to that of an examining magistrate such as the French *juge d'instruction*,

in the judicial procedure of municipal courts. It hears witnesses, examines documents, visits, if necessary, the place where the affair in controversy occurred, and also adopts whatever other methods or processes that may facilitate the establishment of the facts upon which the dispute turns. It aims to clear up the issues for the information of the parties and thereby facilitate a peaceable and just settlement of the dispute. As M. Politis aptly remarks, its general purpose is to substitute light in the place of obscurity. It does not necessarily prevent war but if resorted to, it at least postpones conflict and allows time for reflection and for the sober sense of justice to assert itself.<sup>1</sup> The history of arbitration is full of instances in which the controversies involved issues of fact rather than principles of international law or equity. Not infrequently the facts in controversy were very intricate and complex and their elucidation required many printed volumes of correspondence, documents, arguments and counter-arguments. Often the chief difficulty in reaching a settlement consisted in the inability of the parties to arrive at an agreement through diplomatic negotiation as to what the facts were. These matters once ascertained and cleared up, the chief obstacle to settlement was removed. Manifestly, no fairer or more practicable method for determining this necessary preliminary task could be devised than the institution of a joint or mixed commission of inquiry. It is a task which from its very nature can often not be performed satisfactorily by diplomatic correspondence. Diplomacy is not adapted to the investigation and elucidation of complex and intricate questions of facts; the function of diplomacy is rather political in character and not judicial; its primary task is to negotiate agreements and not to conduct elaborate investigations regarding the existence or non-existence

<sup>1</sup> See his article, *Les Commissions Internationales d'Enquête*, 19 *Rev. Gén.* (1912), p. 153. M. Politis explains lucidly the distinction between arbitration, mediation and inquiry.

of facts. Aside from the practical difficulties inherent in the processes of diplomacy, diplomats are rarely judges or experts. It may happen that the clearing up of facts may require long and patient investigation by scientific, military, legal, or engineering experts, for which diplomats are quite incompetent. In all such cases tasks of this nature should be entrusted to a body of competent experts whose findings are more likely to carry weight and inspire confidence. Herein lies the great merit of the international commission of inquiry.

Unlike arbitration, recourse to this expedient as a means of facilitating the settlement of international differences is of very recent origin. Instances of such recourse were not entirely lacking before the present century, but they were extremely rare, and the few examples which we have were, strictly speaking, less commissions of inquiry than arbitral boards, delimitation commissions or commissions of an administrative character.<sup>1</sup> The idea of an international commission of inquiry in the strict sense of the term, as a practical method for facilitating the adjustment of differences between states appears to have originated with the late Professor Frederick de Martens, the eminent Russian jurist, who had had much experience as an arbitrator and who was deeply impressed with the merits and possibilities of an agency for clearing the ground and preparing the way for the diplomatic adjustment of disputes which involved mainly the determination

<sup>1</sup> Compare Holls. *The Peace Conference at the Hague*, p. 203, and Darby, *International Tribunals*, pp. 838 ff. and 862 ff. M. Politis (19 *Rev. Gén.*, p. 152), says there was no instance before the present century of the employment of an international commission of inquiry upon which there were representatives of neutral powers. He cites the *Don Pacifico* case (1851) between Great Britain and Greece in which a commission composed of one English, one Greek and one French member was charged with making an inquiry regarding certain sums which Pacifico claimed from the Portuguese government and with reporting its findings to the interested parties. But in addition, this commission was authorized to determine the extent of the damage suffered by Pacifico by reason of the loss of certain securities.

of questions of fact. As a delegate to the first Hague Peace Conference, Professor Martens proposed as a part of the general convention for the pacific settlement of international disputes that the signatory powers "agree" that in cases involving "differences of opinion with respect to local circumstances" which could not be settled by ordinary diplomatic methods but in which neither the "honor nor the vital interests" of states were concerned, they would institute an "international commission of inquiry, in order to determine the circumstances which gave rise to the disagreement and to clear up all questions of fact on the spot by an impartial and conscientious examination." His proposal further provided that the report of the commission was to have in no way the character of an arbitral award, but would leave the parties in dispute entire freedom to accept it or not as they chose. It was altogether an extremely moderate proposal by reason of the exception which it made of issues involving national honor and vital interests, its limitation to questions of fact in respect to local circumstances and the non-binding character of the findings. But notwithstanding its moderation the proposal was attacked, chiefly on the ground that it bound the signatory powers in case of such differences to institute a commission, even if it did not bind them to accept its findings. Its opponents were willing to "recommend" the institution of a commission by the parties in dispute, but they were unwilling to impose an "obligation" to do so. The proposal was the subject of long debate in the course of which it was ably defended by Mm. Martens, Descamps, d'Estournelles

In consequence the convention which instituted the commission referred to it as an arbitral commission and its report was in reality an arbitral award. Lapradelle and Politis, *Recueil des Arbitrages Internationaux*, Tome I, pp. 580-597. Politis also refers to certain international commissions of inquiry which have investigated various matters in Turkey, but, as he adds, they had little in common with commissions such as we are here considering, since they were rather "instruments of foreign intervention in the internal affairs of a country than commissions for the adjustment of disputes."



de Constant and others, but, in the end, those who contended that it went too far in the direction of obligatory arbitration won out and as finally adopted it took the form of a "recommendation" that a commission be instituted whenever differences of opinion of the kind mentioned above should arise. And as if this were not enough, the Convention further qualified the recommendation by the addition of the words: "so far as circumstances allow," thus still further emphasizing the optional character of the institution and the freedom of the parties to have recourse to it or not as they might elect. The commission of inquiry was to be an *ad hoc* body constituted as occasion arose by special agreement between the parties in dispute. The facts to be "elucidated" and the extent of the powers of the commission were to be defined in each case by a special agreement. Unless otherwise provided in the special agreement the members of the commission of inquiry were to be selected in the same manner as that provided elsewhere (Art. 32) for the appointment of arbitrators. The Martens' proposal provided that the parties in dispute should furnish the commission with "all the means and facilities necessary for a profound and conscientious study of the facts in the case," but this obligation was regarded as too sweeping for some of the delegates who were afraid that it might oblige the parties to furnish information relating to their means of defense and security and it was therefore modified so as to require the furnishing of information only in so far as they "may think possible." In order to remove all doubt as to the functions of the commission and the character of its findings, the Convention declared that its report should be "limited to a statement of facts" and that it "has in no way the character of an arbitral award." It further added that the powers in dispute were left "entire freedom as to the effect to be given to this statement." Martens' further proposal of a clause that the powers in dispute should be left "entire liberty either to conclude an amicable agreement based on the said report, or to agree to proceed to

arbitration, or, finally, to resort to acts of force usual in mutual relations between nations," was dropped.<sup>1</sup>

Such was the institution which the first Hague Conference "recommended" to the signatory powers. It may be safely asserted that little in the way of practical results was expected of it. Before the meeting of the Second Conference in 1907, however, an opportunity was afforded for putting it to the test. In October, 1904, during the war between Japan and Russia, the Russian fleet under the command of Admiral Rojestvensky while proceeding through the North Sea on its way to the Far East fired upon some English fishing trawlers off the Dogger Bank, killed and wounded several fishermen and sank or damaged a number of trawlers. This apparently wanton and deliberate attack upon innocent fishermen aroused intense indignation in England and was variously denounced as an "unspeakable outrage," an "atrocious act," and the like. The English press was unanimous in its demand for an apology and reparation, and for a time war between England and Russia seemed not improbable.<sup>2</sup> A diplomatic demand was made upon the Russian government for an immediate explanation and it was added that the British government would require "ample apology and prompt reparation, as well as security against the recurrence of such intolerable incidents." The Russian government, on October 25, replied that it had received no report from Admiral Rojestvensky and it could only consider that the

<sup>1</sup> As to the subject of commissions of inquiry at the first Hague Conference, see Hull, *op. cit.*, pp. 277 ff.; Lémonon, *op. cit.*, pp. 73 ff.; Holls, *op. cit.*, pp. 203 ff.; Nippold, *Die Zweite Haager Friedens Konferenz*, Vol. I, pp. 24 ff.; Lapradelle, 6 *Rev. Gén.*, pp. 667 ff. On international commissions of inquiry in general see Bokanowski, *Les Commissions Internationales d'Enquête*, 1908; Le Ray, *Les Commissions Internationales d'Enquête au XX Siècle* (1910); Politis *Les Commissions Internationales d'Enquête*, in 19 *Rev. Gén.*, pp. 149 ff.; Beaucourt, *Les Commissions Internationales d'Enquête* (1909); and Potter, *Introduction to the Study of International Organisation* (1922), Ch. 13.

<sup>2</sup> As to the state of opinion in England, see Hershey, *International Law and Diplomacy in the Russo-Japanese War*, pp. 218-219; Smith

"unfortunate accident" must be attributed to an "unfortunate misunderstanding." At the same time, the Russian government expressed its "sincere regrets at the occurrence" and promised to take the necessary measures of reparation to the sufferers as soon as a clear account is given of the circumstances in which the incident occurred." This expression of regret and promise of reparation did not satisfy English public opinion and there was a demand in many quarters that measures be taken to stop the voyage of the Russian fleet. Preliminary orders for the mobilisation of the British fleets are said to have been given by the admiralty. In the meantime, diplomatic discussion of the matter was proceeding. Again the Russian government expressed its "deepest regret" and promised reparation. Upon the arrival of the Russian fleet at Vigo, Spain, the Russian admiral gave out an interview to the press in which he expressed regret and explained that the "unfortunate occurrence was purely accidental." He stated that during the darkness of the night he had seen what appeared to be two torpedo boats engaged in discharging torpedoes, and supposing them to be Japanese craft, he opened fire upon them. This explanation did not, however, allay the popular indignation throughout England and the demand for punishment of the "guilty officers" of the Russian fleet was only intensified. But manifestly the British government could not justly demand that the Russian government reject the report of its admiral as false and dismiss him without further inquiry into the facts. More and more, the English sense of justice and fairplay asserted itself and when the official report of the admiral was received, Lord Lansdowne proposed that the facts regarding the incident be investigated by a commission analogous to that provided for by the Hague Convention, to be composed of high naval officers representing not only the two governments in

dispute, but several others in addition.<sup>1</sup> The proposal was favourably received by the Russian government and on November 25, 1904, a convention was signed by the two powers by which it was agreed that the matter should be referred to an international commission of inquiry consisting of a representative of each of the two powers, to which were to be added a member appointed by the government of the United States, one appointed by the French government and a fifth member chosen by these four. As finally constituted, the Commission was composed of one English, one Russian, one French, one American and one Austrian admiral, or rear-admiral. Some difficulty was encountered in reaching an agreement regarding the authority to be conferred upon the commission. Lord Lansdowne insisted from the outset that it should be charged not only with reporting upon the facts in controversy but also with fixing the "degree of blame" as well as the "responsibility" attaching to those involved in the attack upon the fishermen. At first agreeing to this proposal, Count Lansdorff subsequently informed Lord Lansdowne that he had come to the conclusion that the British proposal requiring the commission to fix the responsibility and degree of blame was contrary to the provisions of the Hague Convention regarding commissions of inquiry, which contemplated only an elucidation of the facts. To this interpretation Lord Lansdowne replied that the British proposal provided for a commission "analogous" to that contemplated by the Hague Convention and not one "identical" with it, and that Russia had already agreed to a commission constituted "conformably" to the Hague Convention and with power to determine the question of "responsibility." He further added, that it could not "possibly be contended that

<sup>1</sup> M. Politis (article cited, p. 158), says that France, much disturbed by the threatened conflict between Great Britain and France's ally, suggested to the British and Russian governments recourse to an international commission of inquiry.

the question of responsibility is a question of fact but that the question of blame is not." Both, he insisted, were questions of fact and must be passed upon by the commission. It must be admitted that this was a somewhat novel and extraordinary contention; it certainly went beyond the idea embodied in the Hague Convention.<sup>1</sup> As finally agreed upon the article defining the authority of the commission was as follows: <sup>2</sup> "The Commission shall inquire into and report on all the circumstances relative to the North Sea incident and particularly as to where the responsibility lies and the degree of blame attaching to the subjects of the two high contracting parties, or to the subjects of other countries in the event of their responsibility being established by the inquiry."

A comparison of this article with the provisions of the Hague Convention regarding the function of international commissions of inquiry shows that the authority conferred on the North Sea Commission was far broader than that contemplated by the Hague Convention. That Convention limited the Commission to inquiries concerning facts and it did not contemplate the fixing of responsibility or the degree of blame. Its report was in no way to have the character of an arbitral award. But the authority conferred on the North Sea Commission certainly gave it the character of a court as well as a board of inquiry and its proceedings emphasized its character as such, agents, advocates and counsel representing the parties appearing before the commission, presenting cases, making arguments,

<sup>1</sup> Compare A. H. SNOW, "*Judicative Conciliation*," being pamphlet No. 24 (February, 1916) of the publications of the American Society for the Judicial Settlement of International Disputes, p. 7. Mr. SNOW remarks that this contention "was evidently advanced as a diplomatic means of solving a difficulty which threatened to halt the negotiations." See also POLITIS, art. cited, pp. 159-161, and HERSHEY, *op. cit.*, pp. 228 ff.

<sup>2</sup> Text of the agreement in SCOTT, *Hague Court Reports*, pp. 614-615, also in SMITH and SIBLEY, *International Law as Interpreted in the Russo-Japanese War*, p. 283.

and formulating "conclusions."<sup>1</sup> It was in fact a case in which the functions of investigation and arbitration were combined; it was an example of arbitration *sui generis* and altogether unprecedented.<sup>2</sup>

The Commission met in Paris in January, 1905 and on February 25, rendered its report, a majority of the Commissioners holding that since no Japanese torpedo boats were present either among the trawlers or in the vicinity, the firing upon the trawlers was not justifiable and that the responsibility rested upon Admiral Rojestvensky. Nevertheless, the Commission declared that their findings were not of a nature "to cast discredit upon the military qualities or humanity" of the admiral or the personnel of his squadron.<sup>3</sup> Shortly after the rendering of the report the Russian government paid the British government the sum of £65,000 as an indemnity for the injuries sustained by the British fishermen. This was accepted as a satisfactory settlement of the claim and the incident was happily closed. The decision was criticized in some quarters as being a "Scotch verdict" since it found that the Russian

<sup>1</sup> See an article by M. Mandelstam entitled *La Commission Internationale d'Enquête sur l'Incident de la Mer du Nord*, in the *Rev. Gén.* (1905), pp. 161 ff. and 355 ff; and Penha, *La Commission d'Enquête sur l'Incident Anglo-Russe de la Mer du Nord* (1906).

<sup>2</sup> Compare Hershey, *Int. Law and Diplomacy in the Russo-Japanese War*, p. 240. Mandelstam in the article cited in the preceding note criticized the organization and procedure of the commission and especially the combination of arbitral and investigational functions. He defended the Russian view that the jurisdiction of the Commission should have been limited to ascertaining the facts. The combination of functions, he asserted, gave the Commission the character of a hybrid such as was never contemplated by the Hague Conference. Other writers, notably Bokanowski, Le Ray and Beaucourt think the commission should have been empowered to determine the question of responsibility but not the question of blame. But compare the contrary opinion of Politis (p. 168) who argues that the competence of the commission rightly included the determination of both responsibility and blame, otherwise the report would have left the dispute unsettled.

<sup>3</sup> French text of the report in Scott, *The Hague Court Reports*, pp. 609-613; see also Hull in 12 *Rev. Gén.*, pp. 414 ff.

admiral was not justified in firing upon the fishermen, that is, he was responsible for the act, yet it held that he was not to be blamed in the sense that he should be punished.<sup>1</sup>

It is true that the phraseology of the report was a bit unfortunate and likely to give the impression that parts of it were inconsistent with other parts, but this was probably due to the fact that the Commissioners were naval officers rather than lawyers and the distinction between justification in fact and apparent justification, which they doubtless had in mind, was not brought out as clearly as it probably would have been if the report had been drafted by jurists.<sup>2</sup> Nevertheless, the findings were accepted by both governments and English public opinion which a few weeks before had demanded war with Russia felt that English justice had been vindicated.<sup>3</sup> The settlement was a notable victory for arbitration. A controversy involving what the English regarded as "national honor" and one which had brought two great powers to the verge of war had been happily settled and no one to-day could be found who would argue that the settlement would have been more satisfactory if recourse had been had to arms.<sup>4</sup>

The case revealed certain defects as well as merits in the system of inquiry recommended by the first Hague Conference. In the first place, it showed that the procedure was too slow, four months having elapsed between the occurrence of the incident in the North Sea and the rendering of the report. Nevertheless, it had the advantage of postponing resort to war

<sup>1</sup> Hershey, *International Law and Diplomacy in the Russo-Japanese War*, p. 239, and Politis, pp. 163 and 170.

<sup>2</sup> Compare the remarks of John Bassett Moore in the eleventh annual report of the Lake Mohonk Conference on international arbitration, 1905, p. 150.

<sup>3</sup> Compare Lawrence, *International Problems and the Hague Conference*, p. 58.

<sup>4</sup> Barclay, *New Methods of Adjusting International Disputes*, p. 95.

and thus affording an opportunity for passions to cool and for reason to assert itself, so that if the report had not been acceptable to either party, the probabilities of war would have been much less at the time it was rendered than they were during the weeks immediately following the incident. In the second place, the case proved that disputes, the most delicate and irritating, even those involving what one of the parties regarded as its national honor and vital interests may be peaceably settled even when passions are at a high pitch, if the parties make a conscientious effort to settle them, and this without a sacrifice of national honor. It is not at all improbable that if the Hague Convention with its recommendation regarding recourse to international commissions of inquiry had been in force in 1898 when the controversy between the United States and Spain concerning the sinking of the *Maine* arose, the question would have been referred to such a commission. Both governments in fact had inquiries conducted by national commissions which made contradictory reports but investigation by an international commission composed in part of representatives of neutral powers does not appear to have occurred to either government. Many other cases which were peculiarly suitable for inquiries of this kind have occurred in the past and they have not been lacking since 1899.<sup>1</sup> In the third place, the intervention of France in suggesting recourse to an international commission of inquiry showed that when a controversy between two powers threatens to menace the general peace and therefore ceases to be an exclusive affair of the parties in dispute, the good offices of a third power may be employed, with success, in bringing about a peaceful settlement of the difference. Finally, the case seemed to justify the opinion according to which the distinction between issues of law and of fact cannot always be

<sup>1</sup> See an article by Admiral Melville in *The North American Review* for June, 1911, pp. 831-849; also Lawrence, *op. cit.*, p. 56, and Scott, the *Hague Peace Conferences*, I, 268.



precisely maintained. In the North Sea case, there was a question of fact, namely, whether Japanese torpedo boats were present at the time of the firing upon the British trawlers and there were also questions of law, namely, whether Russia was responsible for the acts of its naval commander, both as regards reparation for damages caused and for the punishment of the guilty parties. And the question of law was conditioned upon the question of fact; in order to determine the former it was necessary to determine first the latter. Theoretically, they were distinct and the inquiry might have been limited to the determination of the facts, but in reality this was hardly possible, because a simple determination of the facts would not have settled the controversy. The question of responsibility had therefore to be determined if the controversy were definitely terminated, and in the end Russia agreed to this view. Nevertheless, the contention of the British government that the questions of responsibility and of blame were mere matters of fact, can hardly be maintained; the Russian contention as to the distinction was undoubtedly more in accord with the generally accepted legal view, although it constituted no sufficient reason why the commission should not have been vested with competence to report on both categories of issues. Had the commission been limited to determining the simple question as to whether torpedo boats were present, the more important questions of responsibility and blame would still have been left for settlement through diplomatic negotiation.<sup>1</sup>

At the Second Hague Conference, the partisans of peaceable settlement of international differences made an earnest effort to ameliorate and extend the scope of the institution as recommended by the first conference. The happy settlement of the North Sea case had demonstrated its value and the experience which it furnished suggested the lines along which further progress could be achieved. Profiting by the example

<sup>1</sup> As to the above points, compare Politis, art. cited, pp. 164-169.

of France in suggesting to the British and Russian governments in 1905 recourse to a commission of inquiry the delegation of Haiti proposed that a provision be added to the Convention of 1899 to the effect that the signatory powers should, whenever occasion arose, suggest to the parties in dispute recourse to commissions of inquiry. The proposal was based on the principle that cases might arise in which the parties themselves would hesitate for certain reasons to propose the appointment of a commission, but would welcome the suggestion if it came from one or more friendly and disinterested powers. The principle underlying the proposal had been sanctioned by the conference of 1899 in respect to arbitration, which authorized the signatory powers to remind the parties in dispute that the permanent court of arbitration was open to them. But this very moderate and altogether harmless proposition was rejected.

An effort was also made to extend the purely optional character of the commission so as to make recourse to it obligatory, at least in some measure. The Russian and Dutch delegations, therefore, proposed that instead of "recommending" the institution of commissions of inquiry as the convention of 1899 did, the signatory powers should "agree" to have recourse to them. The proposal retained the exceptions of 1899 in respect to national honor and independence as well as the qualifying phrase "if circumstances permit." The obligation which it contemplated would therefore, have been far from absolute and could have been avoided in most cases by any party upon the plea of honor or inadmissible circumstances. But it had the appearance at least of involving some sort of compulsion, and for this reason it met with strong opposition and was finally withdrawn. The fact that a controversy involving national honor had been submitted to an international commission in 1904 and had been satisfactorily settled, had apparently made no impression on the delegates who opposed every extension of the scope of such commissions. They were unwilling to go one step beyond the point to which the conference of 1899 had gone.

The only amendment which could be agreed upon was the somewhat platonic affirmation that the contracting powers deemed it "expedient and desirable" to have recourse to commissions of inquiry. This was a substitute for the "recommendation" of the Conference of 1899. It did not, however, establish any obligation, legal or moral to have recourse to inquiry. In effect it left the matter exactly where it was left in 1899. Martens' proposal to enlarge the competence of the commissions to embrace the "fixing, if necessary, of the responsibility for the facts" suffered the same fate. Twenty-two new articles were added to the Convention of 1899, dealing with matters of procedure. Experience in the North Sea case had shown that where the Commission itself was obliged to elaborate its own rules of procedure it resulted in considerable delay at a time when public opinion might be inflamed and when a prompt decision would be desirable. The rules agreed upon constitute a fairly elaborate code of procedure; they were, however, mere recommendations and were declared to be applicable to the inquiry procedure only in so far as the parties did not adopt other rules. The formulation of these rules represents the total achievement of the Second Conference so far as it concerned international commissions of inquiry. In the main, the institution was left as it was provided for by the Conference of 1899.<sup>1</sup>

<sup>1</sup> I am unable to share the opinion of some writers who go to the length of asserting that the additional rules of 1907 respecting commissions of inquiry were important enough in themselves to have justified the calling of the Second Hague Conference. See, for example, Nippold, *Die Zweite Haager Friedens Konferenz*, Vol. I, pp. 34. ff. Wehberg, *Kommentar zu dem Haager Abkommen betreffend die internat. Streitigkeiten*, p. 31, and Le Ray, *op. cit.*, p. 56. M. Politis also thinks the work of the second conference constituted a distinct advance. The criticism, such as I have made above, he thinks, is not well-founded. On the contrary, he considers that the Conference deserved to be congratulated for having rejected the Haitian, Russian and other proposals for the friendly intervention of third parties, for strengthening the obligation to resort to inquiry and for extending the competence and rôle of international commissions of inquiry. Such changes, he argues, would only have served to compromise the institution and diminish its usefulness. As to the proposal relative to obligatory recourse, he thinks that should

During the years that have elapsed since 1907 occasions have not been lacking when recourse to inquiry would have greatly facilitated the pacific settlement of differences, but disputing states have rarely "deemed it expedient and desirable" to adopt this procedure. Only two cases of actual recourse have in fact occurred. The first case grew out of the action of the Italian torpedo boat, *Fulmine*, in seizing the French mail steamer, *Tavignano*, during the Turco-Italian War (1912), and conducting it to Tripoli on the suspicion that it had contraband of war on board, a suspicion which turned out to be unfounded. On the same day, two Tunisian Mahones, the *Camorina* and the *Gaulois*, were fired upon by the Italian torpedo boat, *Canopo*. The French government demanded an indemnity for these acts on the ground that they were committed in the territorial waters of Tunis; Italy, on the other hand, contended that they took place on the high seas. The question involved being one of fact, it was peculiarly suitable for determination by an international commission. The two governments therefore concluded an agreement on May 20, 1912, conformably to the Hague Convention of 1907, by which the controversy was submitted to a commission of inquiry composed of three naval officers appointed by the British, French and Italian governments respectively. The commission was charged with investigating and determining the precise geographical point at which the acts complained of took place and with making a report within 15 days from the date of the first meeting. The commission was to follow the rules of procedure of the Hague Convention of 1907 in so far as the procedure was not regulated by the special agreement.<sup>1</sup> The commission

wait until obligatory arbitration has been established; when that advance has been attained obligatory inquiry may be introduced. In the meantime, it is better to leave the matter in the form in which it was recommended by the Hague Conferences. See his article, *Les Commissions Internationales d'Enquête*, 19 *Rev. Gén.* (1912), especially, pp. 183-188.

<sup>1</sup> French and Italian texts of the agreement in Scott, *Hague Court Reports*, pp. 617-620.

after visiting the place and examining witnesses made its report on July 23,<sup>1</sup> but in view of its somewhat indefinite character the parties agreed (Nov. 8, 1912) to refer the controversy to a tribunal chosen from the Hague court of arbitration—the same to which the cases of the *Carthage* and *Manouba* had been referred.<sup>2</sup> Subsequently, however (May 2, 1913) the dispute was settled by diplomatic negotiation, the Italian government agreeing to pay to the French government the sum of 5,000 francs as an indemnity for the damages sustained.<sup>3</sup>

The second case involved a controversy between the Netherlands and Germany as to the facts regarding the torpedoing of the Dutch steamer *Tubontia* on March 16, 1916. The Dutch government contended that the torpedo was launched directly from a German submarine against the vessel, whereas the German government contended that it was aimed at a British vessel and that through defective construction it remained afloat until struck by the *Tubontia* some days later. By a convention of March 30, 1921, the two governments agreed to refer the matter to an international commission of inquiry consisting of five members all of whom except one were naval officers. The commission in its findings sustained the contention of the Dutch government.<sup>4</sup>

In the meantime, in 1911, the movement in favor of recourse to commissions of inquiry received an impetus from the championship of President Taft who caused to be negotiated with Great Britain and France treaties of arbitration in which international commissions of inquiry were to play an important rôle. The treaties were intended to be models of a series of agreements with foreign powers generally. By these treaties the

<sup>1</sup> Text of the report, *ibid*, pp. 616-617.

<sup>2</sup> Text of the *Compromis*, *ibid*, pp. 621-622.

<sup>3</sup> Text of the agreement, *ibid*, pp. 622-623.

<sup>4</sup> Text of the report in 16 *Amer. Jour.*, pp. 485 ff.

parties agreed to settle by arbitration all international differences, not settled by diplomacy, which were "justiciable in their nature by reason of being susceptible of decision, by the application of the principles of law or equity." Instead of making the usual exceptions relative to vital interests, national honor, etc., they provided for the arbitration of all disputes which by reason of their legal character were almost universally admitted to be peculiarly suitable for arbitration. The treaties further provided that all other disputes—that is those which by their nature were not justiciable and therefore not suitable for arbitration—should be referred, as occasion arose, to joint high commissions of inquiry, composed of six members, three to be appointed by each party, for elucidating the facts, defining the issues and making recommendations which, however, were not to have the character of an arbitral award. The question as to whether a particular dispute was justiciable or not was in case of a difference of opinion between the parties, to be decided by the commission of inquiry. Thus the rôle of the commission was not to be restricted to the mere determination of controverted facts but was to include the power to decide the important legal question as to whether the dispute was justiciable or not—that is, whether it was one to the decision of which the principles of law or equity could be applied. No one before had ever proposed to confer such authority upon an international commission of inquiry. It was not clear from the wording of the treaty whether the findings of the commission in regard to the justiciability of a dispute were to be regarded as final and therefore binding on the parties, or whether they were intended merely to have the character of a report which might or might not be accepted, as the parties might choose. President Taft apparently assumed that the decision of the commission would be binding upon both governments and this was the view of the majority of the Senate committee on foreign relations and of many friends of the treaties outside Congress, though the Secretary of State (Knox) who negotiated them as

well as many others took the opposite view.<sup>1</sup> The majority of the senate committee was unwilling to confer upon the commission the final power to bind the parties to arbitrate, and as the wording of the article was not clear on this point, the senate went to the length, though by a bare majority, of striking out the whole article. The senate was quite willing that the commission of inquiry should be retained for its normal function of elucidating and reporting upon facts but it would not consent to the extension of its competence to include binding decisions as to the justiciability of disputes. It might, however, without the least danger, have consented to allow the commission to make a *recommendation* to the parties as to the question of justiciability, for the sake of the moral value of such a report, and it is unfortunate that it did not adopt this course. In consequence of the action of the senate the President dropped the treaties and there the matter remained until the advent of a new President in March, 1913.

Both President Wilson and his secretary of state, Mr. Bryan, were ardent pacificists in the sense that they were in deep sympathy with the movement for the pacific settlement of international differences. Neither favored compulsory arbitration of disputes, for they fully realized that public sentiment in the United States was not yet ripe for it, but they saw no objection to the compulsory investigation of any and all disputes when the purpose was merely to clear up disputed questions of fact and to lay the findings before the parties, leaving them free to take such action as they might see fit. Such a procedure had the great merit of securing an impartial investigation and of preventing a precipitation of hostilities when passions were aroused and national indignation at high pitch. It afforded time for calm reflection and deliberation, for public opinion to mobilize

<sup>1</sup> See an article by W. C. Dennis, entitled "The Arbitration Treaties and the Senate Amendments," 16 *Amer. Jour. of Int. Law*, p. 621.

and for the sober judgment of the people to assert itself. Mr. Bryan, several years earlier in his newspaper, the *Commoner* and at the 14th Conference of the Interparliamentary Union in London in 1906 had advocated the system of compulsory investigation and he came into office in 1913 in full sympathy with the principle of the Taft treaties which had failed to obtain the approval of the senate. He might revive these treaties or he might negotiate new ones. He chose the latter alternative. In order to be assured of the support of the senate he consulted its committee on foreign relations in advance regarding the proposed treaties and obtained its approval. He then presented the general plan of his treaties to the diplomatic representatives of the various powers accredited to the United States and after they had sufficient time to communicate with their governments he proceeded to negotiate a separate treaty with each country. In the course of time, thirty-five such treaties were negotiated, ratified, signed or accepted in principle by different states.<sup>1</sup> Altogether it constituted a diplomatic achievement quite unparalleled in the history of diplomacy. It was Mr. Bryan's idea that not only the United States should enter into such treaties with other states, but that each state should also conclude a similar treaty with every other state so that the entire civilized world would eventually be united by a network of substantially identical treaties. This plan has not yet been realized but the conclusion of so many treaties between the United States

<sup>1</sup> Scott in the Introduction to a volume entitled *Treaties for the Advancement of Peace* (1920) lists 30 countries with which such treaties have been concluded. Of these, the Senate of the United States has advised and consented to the ratification of twenty-eight. Supp. pp. xxxvii-xxxviii. Five others are reported to have accepted "in principle" the idea, though no treaties with them appear to have been concluded. They are, Austria-Hungary, Belgium, Cuba, Germany and Haiti. *World Peace Foundation* pamphlet, Vol. II, No. 2 (May, 1919), p. 35. It appears that actually twenty such treaties are now in force between the United States and other countries. Finch in 15 *Amer. Jour.*, p. 30.



and other powers was in itself a notable step in advance.<sup>1</sup> The phraseology of all the treaties is not identical but the general purport and scope is the same. In their essential parts they are alike, the differences relating to matters of detail due mainly to a desire for more precise formulation of terms and greater precision of expression in certain treaties than in others. In all of them the parties agree, in substance, that all disputes of whatever character and nature arising between them which they have been unable to settle by diplomacy shall be submitted for investigation and report to an international commission. They further agree that they will not declare war or begin hostilities until such investigation has been made and the report submitted. All the treaties provide that the international commission shall be composed of five members: one chosen by the government of each contracting party, one chosen by each government from among the nationals of some third country, and the fifth member to be chosen by common agreement between the two governments. As thus constituted a majority of the members of the commission will be nationals of countries which are "strangers to the controversy." The expenses of the commission are to be borne by the two governments in equal proportion. In case of a dispute between the two governments, which they have failed to settle by diplomacy, it is to be referred at once to the international commission for investigation and report. The commission may, however, act upon its own initiative, and, in such case, it shall notify both governments

<sup>1</sup> In fact several such treaties have been concluded among other states. See, for example, the treaty of May 25, 1915, between Argentina, Brazil and Chili for the creation of a permanent commission of inquiry in the city of Montevideo, to which they agreed to refer for investigation and report all controversies on any subject whatever arising between two or more of them and which could not be settled by diplomacy and by which they also agreed not to go to war during the period of a year allowed for making the report. Text in Scott, *Treaties for the Advancement of Peace*, 1913-1914, p. 147. See also Alvarez, *La Grande Guerre Europ. et la Neutralité de Chili*, p. 68.

and request their co-operation in the investigation. The report of the commission is required to be completed within one year from the date of the beginning of the investigation and must be delivered to the parties in dispute for such action as they may see fit to take. It is not to have the character of an arbitral award and as such to be binding on the parties. During this period, as stated above, the parties are bound to abstain from beginning hostilities. The duration of the treaties is limited to five years, but it is agreed that each treaty shall remain in effect thereafter until twelve months after notice shall have been given by either party of an intention to terminate it. In the absence, therefore, of any such notice the treaty will remain in force indefinitely.

Comparing these treaties with the unratified Taft agreements we note several striking differences. In the first place, the Bryan treaties provide for the compulsory investigation of *all* disputes of whatever character whether they are justiciable or non-justiciable, that is, whether they are questions of law, fact or policy. The rôle of the Bryan commissions is therefore much more extensive than was that of the proposed Taft commissions. In the second place, the Bryan commissions are to be permanent rather than *ad hoc* in character. That is, the parties agree to constitute the commissions immediately following the ratification of the treaty and they are to remain in existence during the duration of the treaty and always be ready to function whenever there is occasion to have recourse to them, whereas under the Taft treaties a commission would have had to be organized *ad hoc* as each specific dispute arose. The commissions under the Bryan treaties were duly appointed and are now in existence and are therefore accessible whenever a controversy arises. In the third place, the Bryan commissions are composed of a preponderating neutral element; this is more likely to insure an impartial investigation than would have been possible with the proposed Taft commissions which were to have been composed entirely of representatives

of the parties in dispute. In the fourth place, the Bryan commissions have the right to act upon their own initiative and begin an investigation without waiting for a request in case the parties in dispute fail to submit the controversy to a commission. And finally, the Bryan commissions are allowed a year's time in which to make their investigation and report, during which period the parties agree not to begin hostilities. Several of the treaties contained an article to the effect that neither party would during this period increase their military and naval programs unless danger from a third power should compel such increase, but the United States senate in advising and consenting to their ratification eliminated this provision. Altogether, the conclusion of these treaties represents the high water mark that had been attained before the outbreak of the World War, in respect to the development of the institution known as the commission of inquiry. It marked an immense advance upon the work of the Hague Conferences in that it created an obligation on the part of the signatory powers to have recourse to investigation instead of leaving them entirely free to do so or not as they pleased; in removing all exceptions in regard to disputes which are to be submitted to investigation; in providing for the creation of permanent commissions containing a preponderating neutral element, with an independent power of conducting investigations upon their own initiative; and, finally, in prescribing a definite period during which there shall be no resort to hostilities.<sup>1</sup> If treaties of this kind were entered into by the whole body of states and their obligations scrupulously performed it would be a long step toward the maintenance of the peace of the world. It is, of course, true that they are not

<sup>1</sup> These treaties, have, however, been criticized on the ground that they make no distinction between political controversies and those involving questions of fact. Little or nothing, it is argued, will be gained by referring disputes of the first-mentioned character to investigation by commissions of inquiry, except perhaps the delay which it will necessitate and consequently the postponement of possible hostilities.

arbitration treaties, they do not provide for the definite settlement of controversies, but by binding the parties to submit all differences of whatever character to investigation and to refrain from resorting to arms for a period which may amount to as much as a year's duration, they greatly diminish the likelihood of hostilities. It may be safely assumed that more than one war of the past would never have occurred had the parties been obliged to defer the beginning of hostilities for so long a period, during which passions might have cooled down, indignation subsided, reason would have had an opportunity to assert itself and the public opinion of the world might have been able to exert a pacifying influence.<sup>1</sup>

Although the conclusion of the Bryan treaties constituted, as I have said, an important step in the development of the commission of inquiry it by no means represented the limit of possible achievement. These treaties were merely bilateral agreements between the United States, on the one hand, and a number of other states, on the other. There are as yet few such treaties among other states than the United States. To many peace advocates what was still desired was a general treaty among the whole body of states and provision for some sort of sanction to insure the performance on the part of the signatories

<sup>1</sup> As to the history and character of the Bryan treaties see a volume published by the Carnegie Endowment for International Peace entitled "Treaties for the Advancement of Peace, 1913-1914," with an introduction by J. B. Scott (1920). This volume contains the texts of the so-called Bryan treaties, a letter of Secretary Bryan to Senator Stone, analysing and explaining the treaties, and other documentary materials bearing upon them. See also editorials in the *American Journal of International Law*, Vol. 7 (1913), pp. 566 and 822, and Vol. 8 (1914), p. 565, and an article in the same Journal, Vol. 10 (1916), pp. 882 ff., by Geo. A. Finch, which contains a valuable analysis of the treaties from the point of view of their variations of phraseology. See also *World Peace Foundation* pamphlet, No. 2, of Vol. II (May, 1919) which contains a historical review and a list of the International Commissions as they had been constituted up to April, 1919; also Hobson, *Towards International Government*, pp. 50 ff., and Hicks, *The New World Order*, pp. 142 ff.

of the obligations thus created to have recourse to inquiry whenever occasion arises. The promoters of the League to enforce peace in various countries took up the matter and in all the projects which they elaborated the idea of compulsory inquiry occupied a leading place. The platform of the American League, organized at Philadelphia on June 17, 1915, proposed the submission to an international court of all justiciable questions arising between states, which could not be settled by negotiation, and the submission of all other questions to a council of conciliation for hearing, consideration and recommendation.<sup>1</sup> This council of conciliation was nothing more than the commission of inquiry under another name with the added function of "recommendation." Later, the role of the council as a mediator was added and emphasized.<sup>2</sup> To insure the enforcement of the obligation thus established to have recourse to the council, the platform of the League further bound the signatory powers to use jointly both their economic and military power against any one of their number which should go to war or commit acts of hostility against another of the signatories before the dispute should be submitted to the international court or to the council of conciliation in accordance with the foregoing provision.<sup>3</sup> Thus for the first time a definite proposal was made looking toward the employment in common of the united forces, economic and military, of the world for the purpose of compelling recourse either to arbitration or to inquiry or mediation. The promoters of the League to Enforce Peace went a step beyond the principle underlying the Bryan treaties. Those treaties established an obligation to resort to inquiry as a means of

<sup>1</sup> Text of platform and commentary in *World Peace Foundation* pamphlet, Vol. VI (Dec., 1916), No. 6.

<sup>2</sup> Official platform of the League adopted at a meeting of the executive committee, Nov. 23, 1918 superseding the proposals of June 17, 1915. Text in *Taft Papers on the League of Nations* (1920), p. 3.

<sup>3</sup> See the interpretative address of Mr. Taft before the World Court Congress at Cleveland, May 12, 1915. Text in *Taft Papers*, cited above, pp. 29 ff.

facilitating the peaceable settlement of disputes, but they did not go the length of providing for the employment of measures of coercion or restraint, to compel the parties to do so. In short, the advocates of the League proposed to substitute *compulsory* inquiry for *obligatory* inquiry.<sup>1</sup> This principle, they argued, was sanctioned in practice by the embargoes and non-intercourse acts which the United States had several times resorted to as a means of compelling or deterring action on the part of foreign governments and by the joint pacific blockades which various powers had employed for similar purposes. They proposed to adopt and apply this means of coercion or restraint, not for the purpose of compelling offending powers to desist from committing wrongs or to redress those already committed but to compel disputing states to have recourse to arbitration or to inquiry or mediation as a means of facilitating the pacific solution of their differences. The employment of joint force for this purpose would therefore, be less objectionable than the so-called pacific blockade measures referred to above. The British and French projects for a League of Nations likewise provided for a council or commission of conciliation to investigate non-justiciable disputes and to recommend the bases of settlement and they also proposed the employment of joint force to compel recourse to the commission whenever the parties were unable to reach an agreement through negotiation.<sup>2</sup> In fact all the projects for a League of Nations, elaborated during the World War were identical in proposing the creation of an organ to be charged with the investigation of controversies which were not regarded as suitable for arbitration and for exercising the function of mediation and recommendation, although they differed as to

<sup>1</sup> Compare Marburg, *The League of Nations* (1918), Vol. II, p. 45. See also Lowell, *A League to Enforce Peace*, *World Peace Foundation* pamphlet, Vol. V, No. 5, part 1.

<sup>2</sup> *Taft Papers*, pp. 206-208.

details.<sup>1</sup> Similarly, all the plans laid before the peace conference at Paris for the organization of a League embodied this principle.<sup>2</sup> President Wilson had in an address before the League to Enforce Peace, on May 27, 1916, advocated it<sup>3</sup> and it found a conspicuous place in the project which he presented to the peace conference.

The covenant as finally adopted made the council of the League the organ for discharging the functions of the commission of inquiry as provided for by the Hague Convention, and the Bryan treaties, and of the council of conciliation as contemplated by the authors of the projects for the organization of the League to Enforce Peace. It is largely the same thing with a different name and organization although the rôle it is intended to play is somewhat greater than that of the customary commission of inquiry. The covenant distinguishes in principle between justiciable and non-justiciable controversies; it binds the members of the League to submit to arbitration disputes of the former character which they recognize as suitable for arbitration; as to other disputes, that is, those which they do not recognize to be arbitrable, they agree to submit them to the council. No preliminary agreement between the disputing members is necessary to bring the matter before the council. The complaining party may, independently of

<sup>1</sup> Compare Scelle, *Le Pacte des Nations* (1919), p. 301.

<sup>2</sup> See the analysis of the Swiss, Italian and Scandinavian projects in Scelle, *op. cit.*, p. 302. General Smuts' plan contained the following recommendations:

(18) That the peace treaty shall provide that the members of the league bind themselves jointly and severally not to go to war with one another—

- (a) without previously submitting the matter in dispute to arbitration, or to inquiry by the council of the league; and
- (b) until there has been an award, or a report by the council; and
- (c) not even then as against a member which complies with the award, or with the recommendation (if any) made by the council in its report.

<sup>3</sup> Text of his address in West and Robinson, *The Foreign Policy of Woodrow Wilson*, p. 325.

the will of the other party, bring it before the council by notifying the Secretary General of the League who thereupon makes all necessary arrangements for the investigation. The parties are bound to furnish the Secretary General, as promptly as possible, with statements of their case, with all the relevant facts and papers, which the council may, if it wishes, publish. Presumably, if one of the parties refuses to furnish the Secretary General with the statements and documents referred to, the council may, notwithstanding, proceed with the investigation on the basis of the information furnished by the other party. The matter once before the council, it is vested with three functions. First, it endeavors to effect a settlement of the dispute by any and all means at its disposal. It may act as a mediator between the parties, it may offer suggestions, it may recommend the bases of a settlement, it may endeavor to induce the parties to resume negotiations, and the like. In brief the council is at the same time investigator, conciliator and mediator.<sup>1</sup> In case it succeeds in bringing about a settlement of the dispute by any of the means mentioned above, it publishes a statement containing such facts and explanations regarding the dispute and the terms of settlement as it may deem appropriate—this doubtless, for the information of the general public. The council is allowed a period of six months during which to make its report and the members of the League agree that they will in no case resort to war until three months after the report has been made. This delay affords the disputants an opportunity to consider whether they can comply with the recommendation. It also gives the council an opportunity for a final effort to obtain their adhesion to the report or recommendation. This "moratorium," which may amount to as much as nine months between the date of the submission of the dispute to the council and the date at which the parties become free to begin hostilities, affords an opportunity for

<sup>1</sup> Compare Scelle, *op. cit.*, p. 302.



them to reflect, and to weigh the probable consequences of war and for public opinion to exert its influence toward a peaceful settlement of the dispute. In the second place, if the council fails to effect a settlement of the dispute it makes and publishes a report containing a statement of facts concerning the dispute with the recommendations which it deems just and proper. These recommendations represent the solution which in the judgment of the council the parties ought to accept.<sup>1</sup> If the proposed solution is approved by public opinion pressure may be brought to bear on the parties to comply with the recommendation. If the report is agreed to by a unanimous vote of the council, other than the representatives of the disputing states which may be represented on the council, the members of the League are bound to abstain from going to war with any party to the dispute which complies with the recommendations of the council. Is it to be presumed, however, that the joint forces of the League will be employed to compel the other party to conform to the recommendations? The phraseology of this clause is obscure and it is difficult to determine its meaning. Without doubt, if both parties refuse to comply with the recommendation, there is no obligation on the part of the other members of the League to employ their joint power to compel them to do so. Apparently, however, in the former case the provision contemplates concerted action to restrain the non-conforming party from interfering with the execution by the complying party of the council's recommendations.<sup>2</sup> If the report of the council is not unanimous the members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

<sup>1</sup> Compare Larnaude, *La Société des Nations* (1920), p. 33; Scelle, *op. cit.*, p. 176, and Pollock, *The League of Nations*, p. 145.

<sup>2</sup> Compare the interpretation by Scelle, *op. cit.*, pp. 177 and 306-307, and Hicks, *op. cit.*, p. 137.

Apparently the thought underlying this clause is that in consequence of the want of unanimity on the part of the council in reaching a decision the disputing parties are free to resort to arms, but that the other members may employ the means at their disposal to prevent it if they choose to do so.<sup>1</sup>

In the third place, the council may in case it is unable to effect a settlement of the dispute or to agree unanimously upon a report and recommendation, refer the matter to the assembly of the League and it is bound to do so if either party so requests within fifteen days after the dispute has been submitted to the council. The report of the assembly if concurred in by the representatives of those members of the League represented in the council and of a majority of the other members of the League, exclusive in each case of the representatives of the parties to the dispute, shall have the same force as a report by the council concurred in by all the members thereof, other than the representatives of one or more of the parties to the dispute. This clause makes the assembly a sort of court of appeal in case the council is unable to settle the dispute and if the dispute is so referred to the assembly it insures an additional period of delay during which the parties cannot resort to arms.

We come now to the sanctions which the covenant establishes for the purpose of insuring compliance on the part of the members of the League with the obligations thus imposed in respect to the submission of their disputes either to arbitration or to investigation and mediation by the council or the assembly. At the outset, the covenant adopts the principle of the criminal law which regards an attack upon the rights of an individual as an attack upon the rights of all. It lays down the rule that if any member of the League resorts to war in disregard of its covenants in respect to arbitration or conciliation it shall be deemed to have committed an act of war against all the other members of the League. It has been proposed that this

<sup>1</sup> Compare on this point, Larnaude, p. 33, and Scelle, p. 308.

principle should be introduced into international law by the general acceptance of the rule that an attack by one state upon the rights of another state in violation of the established rules of international law shall be regarded as an assault upon the rights of all since it is an attempt to subvert the law which is designed to protect all states.<sup>1</sup> The covenant provides that in the event of an attack by a member in breach of its obligations the other members of the League undertake "immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state and the prevention of all financial, commercial or personal intercourse between the nationals of any other state, whether a member of the League or not." Thus the members agree to establish an economic, financial and social boycott or blockade against the offending member and the boycott is to be directed not merely against relations between such member and its fellow members of the League, but also against relations between it and other states not members of the League.<sup>2</sup> This

<sup>1</sup> Compare the address of Mr. Elihu Root entitled "The Outlook for International Law," *Procs. Amer. Soc. of Int. Law*, 1915, pp. 2 ff., and 10 *Amer. Jour.*, pp. 1 ff. See also to the same effect, Fenwick, in 14 *Amer. Pol. Sci. Rev.*, p. 482.

<sup>2</sup> The provisions of the covenant regarding economic, financial and military sanctions are nearly identical with those proposed in General Smuts' plan. Concerning them he said: "What are the penalties incurred by any party which breaks this covenant to observe the moratorium? This is the most important question of all in regard to the preservation of world peace. Without an effective sanction for the keeping of the moratorium the league will remain a pious aspiration or a dead letter. The forces of public opinion which would be mobilized during the moratorium will in most cases be strong enough to restrain the parties from going to war, but to achieve that object the opportunity of the moratorium must be guaranteed with all the force which is behind the league. The breaker of the moratorium and generally of the covenant in paragraph 18 should therefore become *ipso facto* at war with all the other members of the league, great and small alike, which will sever all relations of trade and finance with the law-breaker, and prohibit all intercourse between the subjects of the law-breaker and those of any other state, whether a

insures that the offending member will not be allowed to maintain itself through collusion with other states which may not be members of the League. The establishment of the blockade is to be "immediate" and automatic, that is, no action of the council or other organ of the League is necessary to put it into effect. To wait for a pronouncement of the council in the matter would entail a period of delay which might prove fatal.<sup>1</sup> Apparently the council has no power to order the establishment of the blockade; apparently also each member of the League is to be the judge as to whether

member of the league or not. No declaration of war should be necessary as the state of war arises automatically on the law-breaker proceeding to hostilities, and the boycott follows automatically from the obligation of the league without further resolutions or formalities on the part of the league.

The effect of such a complete automatic trade and financial boycott will necessarily be enormous. The experience of this war has shown how such a boycott, effectively maintained chiefly through sea power, has in the end availed to break completely the most powerful military power that the world has ever seen; and the lesson is not likely to be lost on future intending evil-doers. It is because of this power of the economic and financial weapons that many writers are of opinion that the obligation for action by members of the league should not go beyond the use of these weapons. My view, however, is that they will not be enough if unsupported by military and naval action. A powerful military state may think that a sudden military blow will achieve its object in spite of boycotts, provided that no greater military reaction from the rest of the league need be feared. This fear may under certain circumstances be a more effective deterrent than even the boycott; and I do not think the league is likely to prove a success unless in the last resort the maintenance of the moratorium is guaranteed by force. The obligation on the members of the league to use force for this purpose should therefore be absolute but the amount of the force and the contribution from the members should be left to the recommendation of the council to the respective governments in each case. It will probably be found convenient, and even advisable, to absolve the small members of the league from the duty of contributing military and naval forces and to be satisfied with their participation in the boycott. The obligation to take these measures of force should be joint and several, so that while all members are bound to act, one or more who are better prepared for action or in greater danger than the rest may proceed ahead of the others."

<sup>1</sup> Compare Pollock, p. 147.

a breach of the covenant has been committed, from which it follows that the boycott may not be applied by all members, in which case it might fail for lack of effectiveness. There is a difference of opinion as to whether in the event of a recognized breach of the covenant, the other members are bound to institute a blockade against the offending member. The language of the covenant, however, by which the members "undertake" to apply the measures mentioned above, would seem to indicate the intention to establish a binding obligation which leaves the members no freedom of choice in the matter, except as to the existence of a breach of the covenant.<sup>1</sup> The authors of the covenant foreseeing that isolation measures might prove ineffective, as they doubtless would in certain cases, went further and provided for the employment of their joint military forces in such cases. Thus the council was empowered to recommend (presumably a unanimous vote would be necessary), to the several governments concerned what effective military, naval or air forces the members of the League should severally contribute to the armed forces to be used to protect the covenants of the League. It will be noted, however, that the action of the council is to take the form of a "recommendation" and not an order and is to be addressed individually to the government of each member of the League. Whether non-compliance on the part of any member with the recommendation would be a violation of its obligations under the covenant has been a subject of much discussion.<sup>2</sup> On the one

<sup>1</sup> As to the purpose and nature of the boycott compare Larnaudé, *op. cit.*, p. 36; Scelle, *op. cit.*, p. 320; and Pollock, *The League of Nations*, p. 147. See also Hicks, *The New World Order*, pp. 136 ff.

<sup>2</sup> General Smuts apparently understood that the members would be bound to furnish the contingents recommended by the council. He suggested, however, that the smaller states might be absolved from furnishing military or naval forces. See his "Plan for the League of Nations." He also proposed that the covenant breaking member should, after the restitution of peace, be subjected to perpetual disarmament. The Italian project proposed that the council should be empowered to *require* the members of the League or certain of

hand, it is argued that action in the form of a "recommendation" cannot be regarded as creating an obligation on the part of the government to which the recommendation is addressed; on the other hand, the whole spirit and purpose of the article seemed to contemplate that compliance with the "recommendation" of the council was assumed to be a moral, if not legal duty of the members. And this intention was further strengthened by the following clause which binds the members to "mutually support one another in the financial and economic measures which are taken under this article," and that "they will take the necessary steps to afford passage through their territory to the forces of any of the members of the League which are co-operating to protect the covenants of the League."<sup>1</sup> In case the armed force is thus furnished it will consist of contingents contributed by the different members of the League. The covenant does not provide for the creation of a permanent international armed force, with a general staff or other organs of command to be always at the disposal of the League. The French Association for the Society of Nations advocated provision for such a force and it was ably defended by M. Bourgeois at the Peace Conference, but without success.<sup>2</sup> The French delegation then proposed that provision be made for the creation of a "permanent commission" which was to serve as a sort of general staff to advise the council upon military and naval matters, to prepare military expeditions, etc. But this

them to take the necessary measures to enforce the observance by each member of its obligations and that when so *required* they would be bound to comply with the orders of the council whatever the form of coercion decided upon, whether direct or indirect, economic or military. Scelle, p. 324.

The Committee on amendments of the assembly of the League in 1920 interpreted the obligation regarding participation in military measures to be optional and not obligatory.

<sup>1</sup> Upon request, Switzerland was admitted to membership exempted from this obligation. *Journal Officiel de La Société des Nations*, March, 1920, p. 570.

<sup>2</sup> Scelle, pp. 325 ff.

proposal was likewise rejected.<sup>1</sup> The League, therefore, was left without an army or navy, or any military force or common military command or organization of any kind. In case resort to armed force is necessary to "protect the covenants of the League" dependence must be had upon what would appear to be the voluntary contributions of the member states. Even if the recommendations of the council for contingents are generally complied with, the long delays which must necessarily result in many cases may render recourse to armed intervention impracticable.<sup>2</sup>

Regarding the utility of the machinery thus provided by the covenant for the settlement of differences which the parties are unwilling to submit to arbitration it may be remarked that it represents a distinct advance over the system provided by the Hague Convention and it is distinctly superior to the system provided by the covenant for the settlement of justiciable disputes by arbitration. In the first place, the covenant binds the members of the League to submit to the council all disputes "likely to lead to a rupture" and which they are unwilling to submit to arbitration. They are left no choice in the matter as they are under the Hague Convention and as they are left in respect to arbitration under the provisions of the covenant. Moreover, either party to the dispute may bring it before the council, independently of the will of the other party, merely by notifying the Secretary General of the League. If both parties, however, are opposed to having the council investigate the dispute it cannot assume jurisdiction; at least

<sup>1</sup> Larnaude, p. 38.

<sup>2</sup> It may be remarked that the Italian project proposed in addition to the above mentioned economic and military sanctions a number of others, such as the revocation of the consular exequaturs of the covenant—breaking state, the suspension of treaties with it, the imposition of indemnities, seizure of its property, exclusion of its nationals from entrance to the country, expulsion of its nationals, etc. The French project suggested four categories of sanctions: diplomatic, legal, economic and military. See Scelle, *op. cit.*, pp. 320-321.

one of them must request action before it can proceed with the inquiry.

In the second place, the council being a permanently established organ of the League there will always be in existence a body readily accessible to the disputing parties so that they will not be under the necessity of organizing by mutual agreement an *ad hoc* body to investigate particular cases as they arise. In the third place, the council has been vested not merely with the power of inquiry but also with the function of mediation and pacification. It not only reports upon the facts at issue but it endeavors by all means at its disposal to effect a settlement and if it fails it recommends a solution which if accepted by one of the parties is virtually binding upon the others. In the fourth place, the system insures a "moratorium," a period of enforced peace, during which the parties are forbidden to resort to hostilities, thus affording an opportunity for further reflection and negotiation and for public opinion to exert its influence in the interest of peace. Finally, the system of the covenant goes further than any former Convention in providing for reasonably effective sanction to compel observance on the part of states belonging to the League of the obligations which they have assumed in regard to all the measures thus designed for the maintenance of the peace. So far as the settlement of non-justiciable disputes are concerned the provisions of the covenant, as Mr. Root has observed, constitute "a great step forward."<sup>1</sup> Perhaps the principal criticism that may be directed against the system established

<sup>1</sup> "They create," Mr. Root adds, "an institution through which the public opinion of mankind, condemning unjust aggression and unnecessary war, may receive effect and exert its power for the preservation of peace, instead of being dissipated in fruitless protest or lamentation. The effect will be to make the sort of conference which Sir Edward Grey tried in vain to get for the purpose of averting this great war, obligatory, inevitable, automatic. I think everybody ought to be in favor of that." Letter of March 29, 1919, to Hon. W. H. Hays, regarding the Covenant of the League of Nations, 13 *Amer. Jour. of Int. Law.* (1919), p. 586.



by the covenant is that the council of the League may not always prove to be the best adapted organ for exercising especially the functions of inquiry. It is composed, in the main, of representatives of the great powers and they are more likely to be diplomats and political men than jurists or experts. Its recommendations in respect to disputes between the smaller states may fail for the first-mentioned reason to command their confidence and its findings regarding issues of fact involving purely technical and legal questions may sometimes prove defective because they are the findings of diplomats and statesmen rather than of experts more qualified to investigate such questions. For the purpose of meditation and pacification, however, it would seem that the council is well constituted and its settlement of the Aaland Islands dispute between Finland and Sweden demonstrates its possibilities as an agency for the adjustment of international differences.<sup>1</sup>

<sup>1</sup> Before leaving the subject I may call attention to the provisions made by the treaty of Versailles (Arts. 412-420) for the establishment of commissions of inquiry for investigating and reporting upon certain complaints which may be filed with the International Labor office concerning the observance by the members of their obligations under conventions respecting labor.

The treaty binds each member to appoint three persons of "industrial experience," one to be a representative of employees, one a representative of workers and one a person of "independent standing" to constitute a panel from which the members of international commissions of inquiry composed of three members may be selected by the Secretary General of the League of Nations. To such a commission of inquiry the governing body of the International Labor office may refer complaints of the character mentioned above and the members agree to place at its disposal all the information in their possession which may bear upon the subject matter of the dispute. The commission after full consideration of the complaint prepares a report embodying its findings on all questions of fact involved in the issue, together with such recommendations as it may think proper as to the steps which should be taken to meet the complaint. The report also indicates the measures, if any, of an economic character against a defaulting government, which it considers to be appropriate. The report is then communicated to each of the governments concerned in the complaint and shall cause it to be published. If any member concerned fails to accept the recommendations of the commission of inquiry or is unwilling to submit the

## II

## GOOD OFFICES AND MEDIATION.

Turning now from commissions of inquiry and similar agencies for facilitating the adjustment of international differences we come to consider, in the second place, the more recent developments in the use of a somewhat analogous institution, namely, good offices and mediation. The two latter procedures are similar in that they both imply the conciliatory interposition of a third party whose action takes the simple form of advice. In the popular mind and even in the writings of diplomats and historians they are often confused and the provisions of the Hague convention dealing with the subject appear to make no distinction between them. In fact, however, they are separate and distinct processes, though some writers regard the difference as more theoretical than practical.<sup>1</sup> By means of good offices

matter to the permanent court of international justice established at the Hague any other member shall be entitled to bring it before the permanent court, which may affirm, modify or reverse the findings of the commissions of inquiry, and indicate the measures, if any, of an economic character which it considers appropriate. Its decision is final and if any member fails to comply with the recommendations of the commission or the decision of the court, any other member may apply against the defaulting member, the measures of economic reprisal, thus indicated by the commission or by the court. The League of Nations, it may be remarked, has made some use of commissions of inquiry for purposes of investigation. Thus on February 22, 1921, the Council appointed a commission of inquiry consisting of three persons to investigate the deportation of women and children in Turkey and the surrounding countries. *Official Journal of the League*, March-April, 1921, p. 118, and May, 1921, p. 244. In the same year it appointed an international commission of eight members to investigate the nationality of the Northern Epirotes. It failed, however, to reach an agreement and made no report. *Ibid*, Oct. 1921, pp. 887-888.

<sup>1</sup> For example, Higgins, *The Hague Peace Conferences*, p. 167. See also on this point Merignhac, *Traité Théorique et Pratique de l'Arbitrage*, p. 159; Melik, *La Médiation et les Bons Offices* (1900), p. 113; and Politis, *L'Avenir de la Médiation*, 12 *Rev. Gén.*, 140. The confusion is criticized by Nys, *Le Droit Int.*, III, 89. See also Potter, *op. cit.*, pp. 203 ff.

a third party endeavors to compose differences between two or more other states through advice or suggestion. The party offering its good offices seeks to create an atmosphere favorable to the continuance or resumption of friendly relations between the states in dispute ; it endeavors to bring them together and induce them to accept certain suggestions which are intended to furnish a basis of agreement. The late Secretary of State, John Hay distinguished between two forms of good offices. In the first place he said it means the "unofficial advocacy of interests which the agent may properly represent, but which it may not be convenient to present and discuss on a full diplomatic footing."<sup>1</sup> An example of this form was furnished in 1905 when in compliance with a request of Great Britain the American minister to Argentina was instructed to use his "unofficial friendly offices" in support of the British minister's request for the release from prison of a certain British subject.<sup>2</sup> In a second sense, the term has reference to the friendly official interposition of a state or one of its agents with a view to facilitating the adjustment of a dispute, a good example of which was afforded by the action of President Roosevelt in 1905 in suggesting that Japan and Russia, then at war, open direct negotiation for the conclusion of peace and in offering his own good offices to facilitate such negotiations.

The offer may of course be accepted or refused ; if it is accepted good offices may develop into mediation. Mediation is therefore rather a consequence, a development of the procedure of good offices and a manifestation of the exercise thereof than the same sort of interposition under a different name. A mediator plays a more direct and active rôle in bringing the parties to agreement. He is, as Sir James Mackintosh

<sup>1</sup> Communication of March 16, 1900, to Mr. McNally, quoted in *Moore's Digest*, VII, 3.

<sup>2</sup> Cited by Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, Vol. II, p. 100.

remarked, "a common friend who counsels both parties with a weight proportioned to their belief in his integrity and their respect for his power."<sup>1</sup> If his offer is accepted he becomes more than a counsellor; he plays the part of a middleman between the parties; he may take part in and even direct the negotiations himself. Whether voluntarily offered or requested, mediation, however, never takes place except with the consent of the parties in dispute, but their consent is not necessary to the tender of good offices. Any state is always at liberty to offer its good offices to bring the parties together without the necessity of obtaining the authorization of either of them.<sup>2</sup>

The distinction between mediation and arbitration is even more clearly drawn. Mediation is an advisory, arbitration a judicial function; a mediator is a pacificator who recommends and endeavors to facilitate a settlement, an arbitrator is a judge who decides. Mediation is a species of conciliation; the function of arbitration is to ascertain facts and render an award by the application to the facts of established rules of law or rules agreed upon by the parties. The award of an arbitrator is binding upon the parties whereas the suggestions or proposals of a mediator are not. States have frequently been willing to accept mediation when they were unwilling to arbitrate; on the other hand, they have sometimes agreed to arbitrate disputes which could scarcely have been settled by

<sup>1</sup> Quoted in Lawrence's *Wheaton*, p. 495.

<sup>2</sup> As to the distinction between good offices and mediation, see, in addition to the authorities cited above, Satow, *Diplomatic Practice*, Vol. II, Chs. 32-33, where the matter is fully discussed in the light of history and practice; Oppenheim, *Int. Law.*, Vol. II (third edition), pp. 11-13; Hyde, *op. cit.*, Vol. II, pp. 100 ff.; Moore, *Digest*, Vol. VII, pp. 2 ff.; Scott, *The Hague Peace Conferences*, Vol. I, pp. 256 ff.; Zamfiresco, *De La Médiation* (1911); Rivier, *Droit des Gens*, Vol. II, p. 163; Nys, *Le Droit Int.*, Vol. III, p. 59; Klüber, *Droit des Gens Moderne de l'Europe*, Sec. 160; and Philipson, *Termination of War and Treaties of Peace*, pp. 76 ff.

mediation. The settlement of the Alabama claims case was such an example.<sup>1</sup>

In the beginning, however, the two procedures were hardly distinguished, the one from the other. The domain of arbitration was so restricted that it may be said that mediation was the rule and arbitration the exception. Arbitrators were usually sovereigns who though being vested with the power of decision, not infrequently acted as if they were mediators. The function of arbitration came to be definitely separated from that of mediation only when the practice of designating as arbitrators, judges, jurists, mixed commissions, neutral tribunals, etc., was introduced. Arbitration then tended to become the rule and mediation the exception.<sup>2</sup> Arbitration developed with the development of law and juridical ideas. If the principle of obligatory arbitration should ever be generally adopted, mediation would probably disappear entirely for it would no longer have any *raison d'être*. So long, however, as arbitration remains as it is, mainly facultative in character, mediation will continue to have a place among the expedients for facilitating the peaceable adjustment of international differences. Its domain is broader than that of arbitration because it may be employed for the adjustment of both political and legal differences. And it may be employed to prevent the outbreak of war or to terminate hostilities already begun. It possesses more *souplesse* than arbitration because it may be utilized not only at the request of the parties in dispute but upon the offer of disinterested third parties and since it takes the form of conciliation and suggestion rather than that of a binding award, the parties in dispute are more likely to regard it with favor.

<sup>1</sup> Concerning the distinction between arbitration and mediation see Moore, *Hist. and Dig. of Int. Arbitrations*, Vol. 5, p. 5042; also Snow, *Judicative Conciliation*, pamphlet No. 24 of pubs. of the Amer. Soc. for Judicial Settlement of International Disputes, p. 9.

<sup>2</sup> On this point compare Politis, *L'Avenir de la Médiation*, 12 *Rev. Gén.*, pp. 140-141. Also Lapradelle and Politis, *Recueil des Arb. Ints.*, I, p. xliii.

The use of good offices and mediation, like arbitration, is by no means a new device, though it was not until the end of the last century that it can be said to have found a place in the positive law of nations. They were discussed by the early writers on international law under varying terms though with no clear precision as to the distinction between them;<sup>1</sup> in practice the Pope not infrequently served as a mediator either upon request or with the consent of the parties upon his own offer and Innocent III is said to have declared that the Holy Father was "the Supreme Mediator over all lands of the earth." There were also numerous examples of offers of good offices and mediation by neutral powers before and after the peace of Westphalia.<sup>2</sup> A few early treaties were concluded by which one of the parties agreed to employ its friendly good offices to prevent a declaration of war by certain powers against the other.<sup>3</sup> During the 19th century the number of treaties in which recourse to good offices and mediation found recognition multiplied. Article eight of the treaty of Paris of 1856 stipulated that if any dissension should arise between the sublime Porte and one or more of the other signatory powers threatening the maintenance of their good relations, the Sublime Porte and each of these powers, before resorting to force, would give an opportunity to the other contracting parties to mediate between them in order to prevent such extreme measures. In the protocol of the same treaty the plenipotentiaries "did not hesitate to express in the

<sup>1</sup> For example by Grotius, Pufendorf, Textor, Wicquefort and others. Thus Pufendorf undertook to establish the principle that a belligerent state was under an obligation to accept an offer of mediation and that neutral powers might even compel a settlement upon terms fixed by themselves. *De Jure Naturae et Gentium*, Bk. V, Chap. 13.

<sup>2</sup> The matter is fully discussed by Kenneth Colegrove in an article in 13 *Amer. Jour. of Int. Law*, vol. (1919), pp. 450, ff. See also the historical instances given in Satow, *op. cit.*, Vol. II, Chs. 32-33.

<sup>3</sup> For example the treaty of May 16, 1703 between Great Britain and Portugal cited by Satow, p. 292, n. 2.

name of their governments the *voeu* that states between which a serious dissension should arise should before taking up arms have recourse, in so far as the circumstances admitted, to the good offices of a friendly power," and the hope was expressed that the governments not represented at the conference would associate themselves with the thought which had inspired the view of the protocol.<sup>1</sup> By article 24 of the treaty of Berlin of 1878 the signatory powers reserved the right to offer their mediation to facilitate negotiations for the settlement of any dispute which might arise between Greece and Turkey under the thirteenth protocol of the Congress, regarding the rectification of the frontier between them.<sup>2</sup>

In the meantime, treaties were concluded between various Western powers and Asiatic states by which the former promised their good offices or mediation in case of disputes between the latter powers and other states.<sup>3</sup>

Openly or under the appearance of an impossible reciprocity, says Politis, they created for the profit of one of the contracting parties a right of intervention in the affairs of the other and a means of control over the concurrent policy of third states.<sup>4</sup>

<sup>1</sup> Text in Satow, II, 294 and Melik, *op. cit.*, pp. 109, 114.

<sup>2</sup> In 1880 the powers "forgetting the character of mediation" themselves fixed the boundary in dispute and notified the Porte of their decision and invited him to accept it. Later a new ratification was made and the frontier was settled by a treaty between all the powers concerned. Dupuis, *Le Principe d'Equilibre et le Concert Européen* (1909), pp. 375-376, and Moore, *Hist. and Digest of Int. Arbs.* V, p. 5043.

<sup>3</sup> Such were the treaties of 1858 between the United States and China, and the United States and Japan; between Great Britain and Persia (1857); between the United States and Corea (1882); between Germany and Persia (1873); between Italy and Corea (1884); between France and Corea (1886). See Politis, art. cited, p. 143.

It was in pursuance of the first-mentioned treaty, that the Chinese government in 1894 called upon the American government to use its good offices to bring about the termination of the war then going on between China and Japan, Moore, *Digest*, VII, 19.

<sup>4</sup> Article cited, p. 143.

But parallel with this somewhat insincere movement there grew up a wide-spread demand for the more general utilization of mediation for more genuinely pacific purposes. The view expressed by the Paris Conference of 1856 that, before appealing to arms, states should have recourse, so far as circumstances permitted, to the good offices of a friendly power, ought, it was argued, be converted into a obligation and embodied in a general treaty. This growing opinion found expression in the Berlin act of 1885 relating to the Congo Basin of Africa, Article 12 of which bound the signatory powers to have recourse before appealing to arms to the mediation of one or more friendly powers in case of serious dissension arising between them in respect to territorial boundaries in the area with which the treaty dealt. The treaty further stipulated that as regards dissensions in respect to the liberty of commerce in the conventional basin the interested governments would appeal to the good offices of the international commission of navigation of the Congo by referring to it the facts in dispute for examination.

This provision had a double interest, first, because it contained the germ of the idea of international inquiry and, second, it furnished the suggestion of recourse to the advice, not of a state but of a special organ.<sup>1</sup> In creating an obligation to have recourse to the good offices and mediation of friendly powers, the Berlin act went much further than the treaty of Paris and, it may be added, it went quite beyond the requirements of the Hague Conventions of 1899 and 1907. Unfortunately, however, the obligation was limited to differences arising between the contracting parties only in so far as they related to their rights in the Congo Basin of Africa; it had no application to differences arising between them in other parts of the world or between other states than the signatory powers.

During the latter years of the nineteenth century the principle of obligatory recourse to mediation also found its way

<sup>1</sup> Compare Politis, p. 145.



into some bilateral treaties, notable the treaty of the 28th of April, 1894 between Spain and Colombia and the unratified treaty of arbitration between Great Britain and the United States, of January 12, 1897.<sup>1</sup>

Such was the development of the institution of good offices and mediation before the meeting of the first Hague Peace Conference, in so far as it found expression in treaties, bilateral and multilateral.

Throughout the nineteenth century instances were by no means lacking in which offers of mediation were made but unfortunately they were rarely ever accepted. Sometimes it served indirectly the cause of peace ;<sup>2</sup> but more often it was employed as an instrument of intervention and dictation by the great powers in their dealings with weaker states.<sup>3</sup> The

<sup>1</sup> The treaty between Spain and Colombia after providing for the obligatory arbitration of disputes generally stipulated that in the event of the parties being unable to conclude a special agreement for the arbitration of any particular case because it involved questions of sovereignty they would in every case accept the good offices or mediation of a friendly government.

The proposed Anglo-American treaty of 1897 provided for the arbitration of certain classes of disputes and it added that if for certain reasons the result should prove unacceptable, the parties would not resort to hostilities without having requested the mediation of one or several friendly powers.

<sup>2</sup> Some of the instances in which offers of good offices or mediation were made, generally without effect, are mentioned in Satow, *op. cit.*, Vol. II, Chs. 32-33. As to the attitude and practice of the U. S. see Moore, *Digest*, Vol. VII, pp. 2 ff.

The offer of Russia in 1812 to mediate between the U. S. and Great Britain then at war was accepted by the former but the latter refused it. During the Civil War the United States refused to accept the proffered mediation of the British and French governments. In consequence of the traditional policy of the U. S. toward European "entanglements" the American government uniformly refused to join with European governments in the tender of its good offices, although it was willing to act alone. Frequently it offered to act as a mediator between disputing Latin American States. A remarkable instance mentioned by Moore (VII, 9) was one begun in 1866 and concluded in 1872 for the purpose of bringing to a close the war between Spain, on the one hand, and the allied republics of Peru, Chile, Bolivia and Ecuador, on the other.

<sup>3</sup> See the details and the criticism of Dupuis, *op. cit.*, pp. 375 ff. ; also the strictures of Lapradelle in 6 *Rev. Gén.*, 759.

instances in which it was invoked with success at least to prevent the outbreak of war were so few that they are scarcely worth mentioning.<sup>1</sup> While hundreds of disputes were settled during the nineteenth century by arbitration, good offices and mediation scarcely had to their credit a single important achievement so far as the prevention of wars was concerned.<sup>2</sup> Between 1856 when the pious view of the Paris Conference was emitted and the end of the nineteenth century there does not appear to have been a single instance on which disputing states had addressed a common request to neutrals for mediation.<sup>3</sup> Thus the fruitlessness of experience coupled with the perversion of the institution by the great powers for the purpose of intervention in the affairs of small states had combined to discredit recourse to mediation. If therefore it was to serve in any effective degree the interests of peace in the future it must be rehabilitated and removed from the discredit into which it had fallen.

At the first Hague peace conference an effort was made to bring about this desired result by organizing a workable plan of mediation, by defining precisely its rôle and making it a permanent institution of international law and, if possible, by creating an obligation on the part of states to have recourse to

<sup>1</sup> Moore (*Hist. and Dig. of Int. Arbs.* V, pp. 5042-3) mentions only two—the dispute between Great Britain and Persia (1877) relative to the boundary between Persia and Afghanistan and a dispute between Germany and Spain relative to the sovereignty of Spain over the Caroline and Pellew Islands, which was settled in 1885 through the mediation of the Pope.

<sup>2</sup> In several instances, however, wars were brought to an end through the mediation of neutral powers, among them being the war between Austria and Prussia (1866), that between Peru and Bolivia (1882), that and between Greece and Turkey (1897). Holls aptly remarks, apropos of these cases, that if the same powers had shown half the energy in attempting to prevent these conflicts, it is fair to assume that, at least in the two latter cases, the outbreak of hostilities might have been averted. *op. cit.*, p. 181.

<sup>3</sup> So a Russian delegate stated at the First Hague Conference. Quoted by Scott, *Reports to the Hague Conferences of 1899 and 1907*, p. 96.

it in case of serious disputes which could not be settled by negotiation or arbitration. The matter occupied a place on the Russian program and various projects were submitted to the conference outlining plans of a system to be adopted. The Russian project proposed that in case of grave dissension or conflicts the parties should before appealing to arms, have recourse "as far as circumstances admitted" to the good offices or mediation of one or more friendly powers. This was little more than a reaffirmation of the platonic view of the Paris conference of 1856. An Italian project presented by Count Nigra went further and proposed to establish an obligation to resort to mediation or arbitration in case of imminent conflict between two or more parties. The essential difference between the two projects was that whereas the Russian project made the *demand* for mediation obligatory, the Italian project made *recourse* to mediation obligatory. Dr. Asser, supported by Count Nigra, moved to strike out the words "as far as circumstances admit" in the Russian project on the ground that although it appeared in the Paris *vœu* of 1856 it had been omitted from the Berlin Act of 1885 and that its retention would vitiate in large degree the utility of the agreement and defeat the purposes of the article, because any state which was opposed to mediation could always claim that "circumstances did not permit it." But the opposition to any engagement which implied the slightest obligation on the part of states was so strong that the Italian proposal was rejected. M. Bourgeois, in particular, pointed out that the Berlin Act establishing obligatory mediation applied only to disputes in a particular region of Africa whereas the proposed convention would apply to disputes generally, any and everywhere. The world was not ready, he thought, to go to such lengths. As finally adopted, the article provided that in case of a "serious disagreement or conflict," the signatory powers would, before appealing to arms, have recourse, "as far as circumstances permit" to the good offices or mediation of one or more friendly

powers. The difference between the engagement here entered into and the "voeu" of the Paris conference is slight. No attempt was made to define the meaning of the phrase "as far as circumstances permit."<sup>1</sup> Each party concerned will therefore interpret it as its own immediate interests may seem to require. The state that does not wish to have recourse to mediation will be free to refuse to do so, as before; the obligation can easily be avoided without any violation of a contractual engagement.<sup>2</sup>

The principle underlying this article was that the powers would have recourse to the good offices or mediation of friendly powers—that is, recourse would be obligatory—provided always that "circumstances permitted," and provided it were a case of "serious disagreement or conflict." In such cases it was assumed that the parties themselves would request the mediation of a friendly power. In all other cases recourse would be entirely facultative. Should the right of disinterested friendly powers to offer their services, without being requested, be admitted? The Italian project so proposed and it was accepted, though with reservations which weakened its value. The article as finally adopted provided that, independently of the recourse referred to in the preceding article, the signatory powers considered it to be "useful" (*utile*) that one or more powers who are strangers to the dispute should, on their own initiative, and "as far as circumstances permit" offer their good offices or mediation to the states at variance, that this right might be exercised even during the existence of hostilities and that its exercise should never be regarded by one or the

<sup>1</sup> An attempt to have this qualifying phrase—this "insidious reservation," as Lapradelle styles it,—to read "so far as exceptional circumstances may not prevent" was defeated for the reason that the proposed substitute might strengthen the obligation and make it dangerous.

<sup>2</sup> As to the history and value of this article see Politis, art. cited, pp. 146 ff.; Lapradelle, art. cited, pp. 760 ff.; Hull, *op. cit.*, pp. 267 ff.; and Holls, *op. cit.*, pp. 176 ff.

other party in dispute as an "unfriendly act." The article does not make it the *duty* of third powers to offer their services; the conference limited itself to the mild and harmless declaration that it was "useful" for them to do so. It was not even given the form of a "recommendation." The conference of 1907 apparently feeling that it might with safety go a step further than a mere declaration of "utility" added the words "and desirable" after the word "useful."<sup>1</sup> The addition of these two words added little or no strength to the declaration.<sup>2</sup> The conference hesitated to employ any word or phrase which might seem to convert the right of third parties to offer their services, into an obligation. Even in this harmless form it was too strong for the Servian delegate, who proposed an amendment to the effect that a *refusal* by the parties in dispute of an offer of mediation should not be considered as an unfriendly act—that is, he insisted that the offer of services and the refusal to accept them should be formally placed on the same footing.<sup>3</sup> The retention of the now sacrosanct reservation "as far as circumstances permit" left third powers entire liberty to do nothing, without violating any engagement. Other provisions of the convention, most of which were designed to limit the rôle of mediation and prevent possible abuses, defined the function of mediators as consisting in "reconciling the opposing claims and in appeasing the feelings of resentment "

<sup>1</sup> This addition of two words was the only alteration made by the conference of 1907 in the machinery and process of good offices and mediation as provided by the convention of 1899.

<sup>2</sup> Politis remarks that when the proposal was made in 1907 to add the words "and desirable" following the word "useful" the delegates of some of the small states discussed lively its meaning to ascertain whether "desirable" meant more or less than "useful" preferring themselves the attenuation rather than the strengthening of the offer of mediation. He concludes himself that it is little probable that this "accumulation of epithets" constituted any advance in the direction of the recognition of a legal obligation. Art. cited, p. 154.

<sup>3</sup> Compare Lapradelle, art. cit., p. 763; Holls, *op. cit.*, p. 184; Hull, p. 270.

between the states at variance; declared that the functions of a mediator ceased at the moment when it was declared by either party or by the mediator that the methods of conciliation proposed were unacceptable; that good offices and mediation have only the character of advice and never any binding force; and that the acceptance of mediation could not, in the absence of an agreement to the contrary, have the effect of interrupting, delaying or hindering mobilization or other manœuvres of military preparation. Some of these attenuating provisions were necessary to secure the adhesion of the great powers; others were demanded by the smaller states as the price of their acceptance.<sup>1</sup> Mediation as thus sanctioned must be devoid of every element of coercion; it must be in the main facultative; it must not be a cloak for intervention; it must take the form only of advice and conciliation; and it must not interfere with the preparation of military measures or interrupt military operations already in progress. In this form it offered few possibilities for abuse or danger, and, it may be added, it gave little promise for serving the interests of peace in any substantial or effective manner.

On the whole, the contributions of the Hague conferences represented little advance in the development of good offices and mediation as an instrumentality for preserving the peace. Their work must therefore be regarded as of little value.<sup>2</sup> The most that can be said, perhaps, is that the institution has definitely found a place in positive international law and has thereby received the formal sanction of the body of states.

A final and more important step was taken by the Peace Conference in 1919 which created the League of Nations, the council of which was given the functions of

<sup>1</sup> Mr. Choate remarks: "It will be observed how gradual and tentative and delicate all these agreements and recommendations were, and necessarily so, to secure the unanimous vote that was necessary for their adoption." *The Two Hague Conferences*, p. 22.

<sup>2</sup> Compare Politis, art. cited, p. 147.

a mediator. To this council the members of the League have, as already stated, "agreed" that they will submit any dispute arising between them, which is likely to lead to a rupture and which they are unwilling to submit to arbitration. The council is charged with the duty of endeavoring to effect a settlement thereof by mediation or otherwise and if it agrees unanimously on the terms of settlement, not counting the representatives thereon of the disputing parties, the members of the League will not go to war with the party complying with the terms of settlement proposed.

Such is the present status of good offices and mediation so far as it has been fixed by the Hague conventions and the covenant of the League of Nations. It remains now to inquire how far the institution as thus defined and regulated has in practice served the cause of peace. Unfortunately the instances in which recourse has been had to it since 1899 have been few and the successes achieved have been still fewer. The first occasion for recourse to good offices or mediation occurring after the adjournment of the Hague Conference of 1899 was afforded by the Anglo-Boer war. In May, 1900 delegates representing the South African Republics called on the Secretary of State of the United States and requested the American government to "intervene in the interests of peace and use its influence to that end with the British government." The Secretary of State received them courteously but could not recognize their competence to treat directly with the State Department. In his message to Congress three months after the outbreak of the war, President McKinley stated that "had circumstances suggested that the parties to the quarrel would have welcomed my kindly expression of the hope of the American people that war might be averted, good offices would have been gladly tendered." Sometime after the interview referred to above, the Secretary of State gave out a statement in which he declared that the United States had endeavored to preserve an attitude of strict neutrality between the combatants

but he added that there had never been a moment when the President "would have neglected any favorable occasion to use his good offices in the interest of peace." The request from the government of the South African republics that the United States "intervene" with a view to bringing about a cessation of hostilities was communicated to the British government with the statement that the United States "would be glad to aid in any friendly manner to promote so happy a result." Lord Salisbury thanked the president for "the friendly interest" shown by him but added that Her Majesty's government could not accept the intervention of any friendly power." No further steps were taken in the matter since it would doubtless have been regarded by the British government as an unfriendly act. The American government was the only one of all those approached by the South African Republics which tendered its good offices. The British government having declined to accept the offer, the President felt that "in the present circumstances no course was open to him except to persist in the policy of impartial neutrality." He had done all that the Hague Convention required or authorized.<sup>1</sup>

The next war which followed was that between Russia and Japan in 1904. Neither belligerent had recourse to the good offices or mediation of friendly powers as the Hague convention to which both were parties recommended, presumably because in their judgment "circumstances did not allow it" and it does not appear that any "stranger to the dispute" offered its good offices or mediation, presumably for the same reason. On June

<sup>1</sup> As to the facts regarding the whole matter see Campbell, *Neutral Rights and Obligations in the Anglo-Boer War* (1908), pp. 17-22; and Moore, *Digest*, Vol. VII, pp. 19-21. It was somewhat unfortunate that the request of the Boer government spoke of the services which it invoked as "intervention" when in reality what was meant was "good offices." When, however, Lord Salisbury declined to accept the "intervention" of any other power he probably understood that it was "good offices" which the Boer government really had in mind. Compare Holls, *op. cit.*, p. 183, n. 1.



8, 1905 after the defeat of Russia was virtually an accomplished fact, President Roosevelt addressed an identical note to the Russian and Japanese governments in which he stated that "the time had come, when in the interests of all mankind, he must endeavor to see if it is not possible to bring to an end the terrible and lamentable conflict now being waged." With this end in view, he urged that both governments "open negotiations for peace with one another"; and that they appoint plenipotentiaries for this purpose. He added that while he did not consider that any intermediary should be called in, he was "entirely willing to do what he properly could if the two powers considered that his services would be of aid in arranging the preliminaries as to the time and place of meeting." Favorable replies were returned by both belligerents. Portsmouth, New Hampshire, was agreed upon as the place of meeting; plenipotentiaries were duly appointed, they met in August 1905 and on the 5th of September a treaty of peace was signed.<sup>1</sup> The termination of the war through the friendly offices of President Roosevelt was deserving of the highest commendation but it can hardly be regarded as a notable victory for either good offices or mediation, for the reason that it came only after the war had been fought and practically won by the successful belligerent. It probably prevented a prolongation of the war for several months longer but it failed to spare the world from the consequences which had already been wrought.

<sup>1</sup> See the details in Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, Ch. 13, also Moore, *Digest*, Vol. VII, pp. 21-22. Sometime after the outbreak of the war a committee of the International Arbitration and Peace Association of London had suggested to Lord Lansdowne that the time had come when His Majesty's Ministers might, in concert with other powers, appeal to the governments of Russia and Japan to suspend hostilities in order that measures could be taken toward arriving at a settlement of the difficulties between the two powers. Lord Lansdowne replied that, neither of the belligerents having expressed any desire for mediation, His Majesty's government did not consider that they could take the action suggested. Barclay, *New Methods of Adjusting International Disputes*, p. 27.

In the ensuing year, 1906, mediation was successfully employed to bring about the termination of a war between Salvador and Honduras, on the one side, and Guatemala, on the other. In this case the United States in co-operation with Mexico suggested that direct negotiations between the contending parties be opened on board a United States battleship in the presence of diplomatic representatives of Mexico and the United States acting in a "friendly advisory capacity." Under these auspices a treaty of peace was concluded on July 20 which referred to Mexico and the United States as the "mediating nations."<sup>1</sup> In the next year, 1907, the Presidents of the United States and Mexico tendered their good offices to bring about a settlement of the continued disturbances in Central America. Upon their suggestion representatives of the five Central American states concluded at Washington, on September 7, a protocol providing for a general conference to be held in that city for the purpose of adjusting their differences and of concluding a treaty for the determination of their future relations. By the terms of the protocol the Presidents of the United States and Mexico were to be invited to appoint, if they deemed proper, representatives who should "lend their good and impartial offices in a purely friendly way toward the realization of the objects of the conference." The Conference was duly held and in the presence of representatives of Mexico and the United States, the delegates of the five Central American Republics concluded a series of treaties, one of which provided for the establishment of the short-lived Central American Union and the Central American Court of Justice.<sup>2</sup>

<sup>1</sup> Foreign Relations of the United States, 1906, pp. 834-52, and Hyde, *op. cit.*, I, 101.

<sup>2</sup> See *World Peace Foundation* pamphlet "The New Pan-Americanism," Vol. VII, No. 1; Anderson in 2 *Amer. Jour. of Int. Law*, 144; Scott, *ibid.*, II, 121, and Hyde, *op. cit.*, II, 101.

Four years later, in 1911, the outbreak of the war between Italy and Turkey afforded another opportunity for putting to the test the mediatory machinery of the Hague Conventions. Neither party however, appears to have taken any steps toward averting the outbreak of the war through recourse to good offices or mediation. Nor did any "stranger to the controversy" tender its good offices, doubtless because "circumstances did not allow it." After the war had gone on for some months some indirect attempts were made by certain powers to bring about an agreement between the two belligerents and a termination of hostilities. On July 1, 1912 the Russian government communicated a circular note to the powers urging them to consider seriously the situation and to seize the first favorable opportunity for mediating between the contending belligerents, as they were authorized to do by article 3 of the Hague Convention. Representatives of Austria-Hungary, France, Germany, Great Britain and Russia accordingly took steps toward obtaining from the Italian government a statement of the terms upon which it would be willing to conclude peace. The Italian government expressed its thanks to the powers for their suggestion of mediation and stated the conditions upon which it would conclude peace, declaring at the same time that the recognition by Turkey of the full and complete sovereignty of Italy over Tripoli and Cyrenaica must precede any discussion of the conditions of peace. The ambassadors at Constantinople of the same powers called on the Turkish Foreign Minister and pointed out the danger to the peace of Europe from a continuation of the war. The Ottoman government sent the ambassadors an official reply in which it expressed its appreciation of the motives which had animated the great powers in inquiring as to the conditions upon which mediation would be acceptable and reminded them that at the very outbreak of the war it had sought the good offices of the powers with a view to inducing Italy in the interest of the general peace and the faith of treaties to refrain from making war upon Turkey. The

surrender of the provinces demanded by Italy, the statement concluded, would provoke a revolution throughout the Ottoman Empire and it could not therefore enter into negotiations on any basis which did not recognize the integrity of the Empire and the sovereignty of the Sultan in the territories mentioned. In the presence of a deadlock in which neither party was willing to yield or to compromise, further efforts at mediation seemed useless and the war continued until Turkey had been defeated and was forced to accept the terms of peace dictated by Italy.<sup>1</sup>

During the progress of the Turco-Italian War conditions in European Turkey were hastening the outbreak of the first Balkan war which came in 1913. When the outbreak became imminent the diplomatic representatives of the great powers bestirred themselves to prevent it. Count Berchtold of Austria-Hungary obtained the consent of the European chancelleries to the setting up of a court of arbitration to decide the issue between Turkey and the Balkan states and the immediate instigation of a policy of "progressive decentralization" in Macedonia and Albania, but events moved too rapidly to permit discussion of the latter reform. Russia and Austria-Hungary were then deputed to act jointly for the powers in the Balkan capitals, the powers themselves to act collectively at Constantinople. On October 8, 1912, mediation having failed, the ministers of the two first mentioned powers delivered a note to the Balkan States notifying them that if war broke out they

<sup>1</sup> For a detailed discussion of the efforts at mediation see Sir Thomas Barclay's book, *The Turco-Italian War and its Problems*, (1912), Ch. I; See also Coquet, 19 *Rev. Gén.*, pp. 396 ff., and Rapisardi Mirabelli in 44 *Rev. de Droit Int.*, pp. 420 ff. Also editorials in 6 *Amer. Jour. of Int. Law*, pp. 463 ff., and 719 ff. During the war Sir Thomas Barclay proposed a draft recommendation by which the parties were to accept mediation by Great Britain. The draft also suggested the terms of the recommendations which the mediator was to make. They were such that Turkey would doubtless have accepted them but there is no reason to believe that they would have been considered by Italy.

would not permit any modification in the territorial *status quo* in European Turkey. But it was not supported with force, and besides, it was too late. Thus both mediation and threats failed to prevent the war. They were equally ineffective in preventing the Second Balkan War in 1914.

In 1914 occurred the A. B. C. mediation between the United States and Mexico. The relations between the two governments were severely strained on account of certain acts of General Huerta who had become head of the *de facto* and provisional government through the assassination of his predecessor, Madero, and whom the President of the United States had refused to recognize. On April 25, when a virtual state of hostilities between the two countries had begun, the Argentine, Brazilian and Chilean diplomatic representatives at Washington acting upon the authority of their governments addressed a joint note to the Secretary of State in which they tendered their good offices "for the peaceful and friendly settlement of the conflict between the United States and Mexico"—this for the purpose of "sub-serving the interests of peace and civilization on our continent and with the earnest desire to prevent any further bloodshed, to the prejudice of the cordiality and union which have always surrounded the relations of the governments and peoples of America." The United States government promptly accepted the "generous offer" and expressed its willingness to discuss with them "in the frankest and most conciliatory spirit any proposals that might be authoritatively formulated." General Huerta and General Carranza, first chief of the Revolution, both accepted "in principle" the offer of mediation and both the United States and General Huerta agreed to a mutual suspension of hostilities at the request of the mediators, though General Carranza refused, and in consequence was not represented in the mediatory proceedings.

On May 20, 1914, a conference was opened at Niagar, Ontario, at which commissioners representing the United States and Mexico attended and where under the direction of the

mediators, the protocol of an agreement was signed on June 24, which provided for the establishment of a provisional government in Mexico, which the United States was to recognize. On their part, the three mediating governments agreed to recognize the provisional government so organized. General Huerta agreed to withdraw from the *de facto* presidency which he occupied, in order to open the way for a settlement, but General Carranza refused and the internal struggle in Mexico continued. The differences between the United States and General Huerta were, however, adjusted and hostilities were not resumed. The outcome was therefore a victory for mediation only in a limited sense. Its chief value rather lay in the precedent which it set. It established the principle that thereafter "when any American country gives itself over to anarchy, those governments that prefer order to disorder, following the precedent of the 'A. B. C.' mediation, can jointly intervene to command the peace."<sup>1</sup>

The same year that witnessed this rather notable if not entirely successful case of mediation saw the outbreak of the great European War, which afforded abundant opportunity for testing the machinery and processes of mediation. Unfortunately, however, as has with rare exceptions been the case, they proved fruitless in preventing the outbreak and spread of the war, though efforts were not lacking. At the very outset Great Britain, Russia and France, in particular, made every effort to obtain from Austria an extension of the period of forty eight hours which the latter power had imposed on Servia as the time limit for the return of her reply to the Austrian ultimatum, in order that the powers might, if possible, exert their influence

<sup>1</sup> Slayden, "The A. B. C. Mediation," 9 *Amer. Jour. of Int. Law* (1915), p. 150. For a full history of the mediation, with texts of the official documents, see *World Peace Foundation* pamphlet, "The New Pan-Americanism," Vol. VI, No. 1 (1916), pp. 14-36; also editorial in 8 *Amer. Jour. of Int. Law*, pp. 579-585 where the principal documents are printed.

in the interest of a peaceable settlement, but their efforts proved fruitless.<sup>1</sup> They were able, however, to induce Serbia to return a conciliatory reply to the Austrian ultimatum and although Serbia agreed to most of the Austrian demands and agreed to refer her offers in case they were unacceptable, to the Hague Tribunal or the mediation of the great powers, they were refused.<sup>2</sup> The powers also urged Austria to delay military operations and accept the Servian reply as a basis for further discussion but this offer was likewise refused and Austria declared war. The request of the Czar of Russia that the German Emperor endeavor to mediate between Austria and Serbia, proved equally fruitless. Sir Edward Grey then proposed a mediatory conference of the ambassadors of Germany, France, Italy and Great Britain at London with a view to preventing the outbreak of the war. To this proposal Germany objected that such a conference would practically amount to a court of arbitration and Germany could not consent to drag her ally before such a court for the settlement of her differences with Serbia<sup>3</sup> although she professed to be in favor of mediation "in principle" and was ready to co-operate in mediation to keep the peace between Russia and Austria.<sup>4</sup> Sir Edward Grey explained that the proposed conference was not to have the character of a court and that nothing would be proposed which had not been first submitted to both Austria and Russia for their approval. Since Germany had accepted mediation "in principle," Sir Edward then asked Germany to suggest the form it should take and to "press the button." The only response was that the British suggestion had been passed on to Austria. The British foreign minister continued his

<sup>1</sup> See the details in Stowell, *The Diplomacy of the War of 1914*, pp. 59-61.

<sup>2</sup> *Ibid*, pp. 64-80.

<sup>3</sup> Stowell, *op. cit.*, p. 208.

<sup>4</sup> Lichnowsky's note of July 27, *ibid*, p. 211. See also p. 271.

mediatory efforts to the last but they were without success.<sup>1</sup> The War spread from state to state and from continent to continent until it became world-wide. Good offices and mediation, as instrumentalities for averting the outbreak of the war, had completely broken down.

The Council of the League of Nations upon which the function of conciliation is conferred by the Covenant has been able since the war to effect the settlement of several differences between states. It has frequently been appealed to by states which had grievances of one kind or another against their neighbours; whenever the complaint came within its jurisdiction it has made an effort to settle the difference by one means or another. It was criticized for having done nothing to prevent the war between Poland and Russia in 1920 but it was hardly to blame, for the reason that Poland's invasion of Russia had the silent approval of the Western powers and no member of the League requested it to intervene.<sup>2</sup> Persia appealed to it against the Bolshevist invasion but before it could act the matter was settled by direct negotiation between the parties.<sup>3</sup> Upon the request of Great Britain and with the consent of Finland and Sweden it took jurisdiction of the dispute between the two latter countries regarding the Aaland islands and effected a settlement which both parties accepted.<sup>4</sup> The King of Hedjaz appealed to it against certain acts of the French

<sup>1</sup> The full details as to the persistent and laborious efforts of Sir Edward Grey to prevent the outbreak of the war between Austria and Servia and between Austria and Russia are set forth by Stowell, *op. cit.*, pp. 59-273.

<sup>2</sup> Compare Sweetser, "The First Year and a Half of the League of Nations," *Annals Amer. Acad. of Pol. and Soc. Science*, Vol. XCVI (July, 1921), p. 28.

<sup>3</sup> *Official Journal of the League of Nations*, July-August, 1920, pp. 217-218.

<sup>4</sup> *Ibid*, July-August, 1920, pp. 247 ff.; Jan.-Feb., 1921, pp. 66 ff.; and Sept., 1921, pp. 691 ff., and Special Supp. No. 3 Oct. 1920 entitled: *The Question of the Aaland Islands*, Report of the Commission of Jurists, *Official Journal*, Sept. 1920, p. 343.



authorities in Syria but the council declined to take action on the ground that the matter was beyond its competence. It took cognizance of the appeal of Armenia against the aggressions of the Turks and it obtained the consent of the President of the United States to act as mediator between the disputing parties.<sup>1</sup> It heard a complaint of the Polish government against the expulsion by the Austrian government of Galician Jews and decided that there was no rule of international law or treaty stipulation between the parties which prevented Austria from expelling from her territory persons not possessed of Austrian nationality. Both parties were invited to appoint representatives to a conference for reaching an agreement as to the execution of measures of expulsion; this they did and thanks to the conciliatory attitude of both parties a satisfactory solution was reached which was accepted by both.<sup>2</sup> It intervened to protect Albania against the occupation of Jugo-Slav troops of certain Albanian districts.<sup>3</sup> The dispute between Lithuania and Poland proved to be the most difficult of all those with which the council was occupied, because of the hostile and uncompromising attitude of both parties. The mediatory action of the council was invoked and it proposed one plan of settlement after another without complete success. In 1921 M. Paul Hymans, President of the Lithuanian-Polish conference and member of the League Council, proposed terms of settlement which were accepted by both parties with certain modifications.<sup>4</sup>

Bolivia and Peru appeared at one time to have desired to present their dispute with Chile concerning the Tacna-Arica region to the Assembly of the League but subsequently Peru

<sup>1</sup> *Ibid.*, Jan.-Feb., 1921, p. 10 and pp. 79 ff.

<sup>2</sup> *Ibid.*, March-April, 1921, p. 176.

<sup>3</sup> *Ibid.*, Oct., 1921, pp. 882 ff.

<sup>4</sup> See the details in Official Journal of the League, March-April, 1921, pp. 181 ff.; May, 1921, pp. 271 ff.; Oct., 1921, pp. 869 ff. or Nov., 1921, pp. 993 ff.

withdrew her request. Panama also invoked the action of the League in her boundary dispute with Costa Rica and upon request of the council both governments submitted their cases to it but in the meantime the United States offered to mediate in the matter and the council took no further action.<sup>1</sup> It will be seen from this brief review that the mediatory services of the League of Nations have been rather frequently invoked and while they have not always resulted in success they have in a number of cases led to the settlement of irritating controversies.

As to the future of mediation one or two observations may be made. It must be admitted that the results of experience at least with the plan embodied in the Hague Conventions have been disappointing. In fact the machinery and processes of the Hague have well nigh proved valueless as means of preventing recourse to war. Experience has shown that states are generally unwilling to invoke the good offices or mediation of even the most friendly disposed powers and that when offers are tendered by third parties who are "strangers to the dispute" they are rarely accepted. In the majority of cases states prefer to take the chances of success through an appeal to arms rather than trust their cases to the mediatory settlement of a common friend, and there seems to be little prospect that the body of states will ever consent to bind themselves by general convention to have recourse to such a mode of settlement. Mediation therefore will remain for the present as a facultative rather than an obligatory form of recourse and resort to it will increase in proportion as public sentiment in favor of peaceable means of settling differences develops. In the meantime, the problem is to devise a more perfect machinery

<sup>1</sup> As to the dispute between Panama and Costa Rica and Panama's appeal to the League of Nations see official *Journal of the League of Nations*, March-April, 1921, pp. 214-219 and *ibid*, June, 1921, pp. 341-344.

and procedure for its application. That provided by the Hague conventions is defective and not likely to be frequently utilized. The mediatory organ created by the League of Nations is better adapted because it is a grand council of the chief powers and disputing states will be more disposed to invoke its mediatory services than those of a single sovereign or government. Furthermore, it enjoys a legal and moral prestige which will inspire a respect and confidence which no single individual or government can hardly be expected to command.<sup>1</sup>

<sup>1</sup> The late Professor Lammasch, in an article entitled "Unjustifiable War and the Means to Prevent It," published in 10 *Amer. Jour. of Int. Law*, p. 703, pointed out the advantage of mediation by the "combined power of states interested in the prevention of peace," over mediation by a single state. Sir Thomas Barclay suggests that the "permanent official peace organisation at the Hague" might be made an instrument of mediation by the powers. To this end he prepared the draft of a project which provided that in case of disagreement between any of the contracting powers leading to a rupture of diplomatic relations they should communicate to the International Bureau at the Hague an *exposé* of their grievances; the Bureau should then forward printed copies of the same to the diplomatic representatives of the other contracting parties at the Hague; they should thereupon assemble and ascertain if any powers were prepared to offer their good offices for the purpose of mediation. Text of the draft in his *New Methods of Adjusting International Disputes and the Future*, p. 29.

## LECTURE XII

### Development of International Legislation and Organization.

Without doubt, one of the most significant developments of the nineteenth century for the student of international law was the transformation of the so-called "family of nations" into a real society of states. At first without common organs, legislative, executive or judicial, this society is now in the process of acquiring a definite organization and it is safe to assume that the present century will see the full completion of the process. This transformation is a necessary result of the development of a solidarity of interests among the body of civilized states, which requires co-operation and common agencies for the promotion of those interests. It is impossible to fix a precise date at which the world ceased to be a mere aggregate of isolated and self-sufficing states and became an international society. The transformation was slow and gradual like the development of international law itself. The Spanish Jesuit Suarez in his treatise *De Legibus ac Deo Legislatore*, published in 1612, maintained that a society of states had already come into existence in his time ; that states no longer lived in isolation, and that there had developed among them an international juridical consciousness and a certain reciprocity of moral and legal obligation.<sup>1</sup> Some present-day writers hold that the existence of an international society dates from the peace of Westphalia which "gave Europe for the first time an

<sup>1</sup> See Schücking, *op. cit.*, p. 12, where the oft-quoted passage from Suarez is reproduced in Latin. See also the comments of Hill in his *World Organisation and the Modern State*, p. 82. Victoria in the 16th century and Grotius and Wolff in later centuries also recognized the existence of an "international community." Compare in this connection the remarks of Rivier, *Droit des Gens*, Vol. I, p. 9.

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it was not a "complete organization of the international community" because it did not embrace the whole family of nations and it was, furthermore, an organization mainly for judicial purposes, and even as to these matters, it was only embryonic and rudimentary in character. As to all other common interests, in so far as they were not dealt with special international administrative unions the "community of states still remained anarchical."<sup>1</sup>

For centuries philosophers and jurists had dreamed of some sort of federation of the world and some of them had elaborated schemes and projects of organization by which, in their opinion, this could be accomplished. The projects of Henry IV of France (the "Great Design"), of Eméric Crucé, and of William Penn, of the Abbé St. Pierre, of the Abbé Gregoire, of Bentham, Rousseau, Kant and others are well known to students of international law. Most of them, however, were schemes for the maintenance of perpetual peace and were largely the fanciful and impracticable conceptions of idealists, though a few of them contained ideas that were sound enough and may ultimately find their place in the final organization that will ultimately be adopted.<sup>2</sup>

<sup>1</sup> Such is the thesis of Professor Schücking in his remarkable book, *The International Union of the Hague Conferences*, being an English translation by C. G. Fenwick of a German work entitled *Der Staatenverband der Haager Konferenzen*, published in 1912. See also his earlier work *Die Organisation der Welt* (1908). Lawrence (*op. cit.*, p. 42) apparently supports the thesis of Professor Schücking. Judicial organs, he remarks, were already in the process of development and he looked forward to a series of conferences which would provide international society with a permanent organ of legislation. Cavaglieri in an article entitled *La Société Internationale* (18 *Rev. Gén.*, pp. 259 ff.), also maintained that an "international juridical society," had come into existence. Nys (*op. cit.*, I, 63) after tracing the development of international society through the centuries concludes that the sovereign civilized states, form an "association." Rivier (*Droit des Gens.*, I, 8) recognized the existence of a "society of nations" based on a "common international juridical consciousness."

<sup>2</sup> These and other schemes (29 altogether) are fully discussed by Ter Muelen in his *Gedanke der Internationalen Organisation im Seiner*

In more recent times, numerous schemes have been proposed most of which were based upon the earlier projects and were largely elaborations of the ideas which they contained. All of them, however, emphasized less the features of international legislative and executive organs and devoted more attention to the establishment of an international court or an arbitral tribunal.<sup>1</sup>

The eighteenth century closed with no record of achievement in the direction of international organization. In fact no serious attempt had been made to realize any of the numerous schemes that had been proposed or to effect an organization along other lines. But the early years of the nineteenth century were destined to see the first move at least in the direction of international control. The Napoleonic wars had created a situation not entirely unlike that which Europe faced at the close of the late World War. It presented the problem of general liquidation and reconstruction of Europe and made concerted action by the victorious belligerents a necessity. The initiative was therefore taken by the four great powers (Great

*Entwicklung* (the Hague, 1917). The more important of them are described and analyzed by Darby in his *International Tribunals* (London, 1904), and by Hodé in his *L'Idée de Fédération Internationale dans l'Histoire* (1921). Summaries may be found in Woolsey *International Law*, pp. 392 ff.; Phillips, *The Confederation of Europe*, Ch. II; and in Hicks, *The New World Order*, Ch. V. A bibliography of the literature may be found in Hicks, pp. 462 ff.

<sup>1</sup> Among the more recent projects may be mentioned those of Lorimer, Fiore, La Fontaine, Schückung, Woolf and the various peace societies and League of Nations associations prior to and during the World War. See Levermore, *Plans for International Organization*, also his *Synopsis of Plans for International Organization*, in the *Messenger of the N. Y. Peace Society*, for Jan. 1918, and in the *Advocate of Peace* for July, 1919. Lorimer's project may be found in his *Institutes*, Vol. II, Ch. 14; Fiore's in his *International Law Codified*, bk. iv; Woolf's in his *International Government*, Part III; and Schückung's in his *International Union of the Hague Conferences*, Ch. V. See also the plan proposed by Professor Minor in his *Republic of Nations* (1918) and the Recommendations of the American Institute of International Law at its session of 1917, *Acte Finale de la Session de la Havane* (1917), pp. 15 ff.

Britain, Russia, Prussia, and Austria) which had succeeded in crushing Napoleon. By a series of treaties beginning with that of Chaumont (1814) and including the treaties of Vienna and Paris and the Act constituting the so-called Holy alliance, a "Confederation of Europe" was formed for the purpose of maintaining the peace, especially against the future disturbance of Napoleon and for dealing with the European situation as subsequent events might require. The treaty of Chaumont which constituted the foundation of the "Confederation" pledged the allies to joint action in the prosecution of the war against France and the maintenance of the territorial and other arrangements which should be agreed upon at the conclusion of the war. The declared object of the alliance was the "maintenance of the balance of Europe, to secure the repose and independence of the powers and to prevent the invasions which for so many years have devastated the world." The duration of the alliance was fixed at 20 years, which period might be extended by agreement, if circumstances demanded it.

By the first treaty of Paris (May 30, 1814), which was signed by plenipotentiaries of France, Portugal, Sweden, and Spain, in addition to those of the four allies, it was agreed that the disposition of the territories which France renounced, as well as "the relations from which a system of real and lasting equilibrium in Europe is to result" should be determined by a Congress on "the bases determined by the allied powers among themselves." This treaty was the "first formal step in the process of the reconstruction of Europe."<sup>1</sup> The Congress referred to assembled at Vienna in October, 1814. All Europe except Turkey was represented but its organization, procedure and, in the main, its decisions were determined by the four allied powers. They rearranged the map of Europe, restored dispossessed dynasties, neutralized Switzerland, created the German Confederation, united Belgium and Holland,

<sup>1</sup> Phillips, *The Confederation of Europe*, p. 91.



internationalized the great rivers of Europe, defined the several grades of diplomatic representatives, sanctioned measures for the suppression of the slave trade, etc. The smaller states whose destinies were thus determined were allowed no voice in the decisions, although they were given a hearing. The principle of equality of states found no recognition at the hands of the Congress. The four powers regarding themselves as the trustees of Europe and the directors of its destinies claimed and exercised the right of decision in its full plenitude.<sup>1</sup> The treaty of Vienna, as the basis of an enlightened system of European public law, was disappointing. The best that has been said of it is that it "constituted the nucleus of an international public code to which additions were to be made as occasion required" and that "it established, in idea at least, a concert of the great powers and the right of others to be taken into counsel where their interests were involved even if it was destined in practice to be but little recognized."<sup>2</sup>

The Congress of Vienna was followed by a series of meetings or congresses at Troppau, Laybach, Aix-la-Chapelle and Verona. At the Congress of Aix-la-Chapelle France was admitted to the concert so that the quadruple alliance became a quintuple alliance. At these meetings the great powers dealt with various questions of general European interest. They assumed the rôle of guardians, trustees and directors of European affairs. They occupied themselves with the suppression of the slave trade, the fixation of diplomatic grades, the suppression of the barbary pirates, the refusal of states to fulfil their treaty engagements, etc. Under their direction revolutions were suppressed in Italy and Spain and preparations were under way to extend their intervention to South America when the President of the United States announced the Monroe doctrine which caused the proposed intervention to be

<sup>1</sup> See the excellent summary by Dickinson in his *Equality of States*, pp. 294-96.

<sup>2</sup> Phillips, *op. cit.*, p. 120.

abandoned. Such was the first attempt to establish an international system for Europe. It never acquired the form of an organization, except in so far as provision was made for periodic conferences, a number of which, as stated above, were duly held. No common executive, or judicial organs were created and none appear even to have been proposed. Nevertheless it constituted a step in the direction of international co-operation or rather of control. Whatever the motives of those who appealed to it, it was based on the utility of concerted action for the preservation of the general peace and the maintenance of the sanctity of treaties. On the whole, it failed to accomplish its purposes but it produced certain effects: it established a tradition of respect for the obligation of international engagements; it gave an impetus to the development of international law and it inspired the hope of the establishment of an effective international system. "Without the Holy alliance there would have been no Hague Conferences."<sup>2</sup>

After 1823 the "Confederation" as such virtually ceased to exist largely because of the refusal of certain of its members to co-operate in its policy of intervention and because of the discredit into which it had fallen. It was replaced however by the policy of joint action known as the "European Concert" by which the great powers continued from time to time to exercise control and supervision over the affairs of the lesser states. This policy was based upon understanding rather than upon treaties of alliance. In 1827 Great Britain, France, and

<sup>1</sup> The best analyses of the character and methods of the so-called European Confederation may be found in Phillips, *The Confederation of Europe* (1914), and in Dupuis *Le Droit des Gens et les Rapports des Grandes Puissances avec les Autres Etats* (1921), especially Ch. II; see also his *Le Principe d'Equilibre et le Concert Européen* (1909). See also Hicks, *The New World Order*, Ch. VI; Dickinson, *The Equality of States*, pp. 292 ff.; and Snow, *American Diplomacy*, pp. 237 ff.

<sup>2</sup> Phillips, *op. cit.*, p. 9.

Russia intervened in the Græco-Turkish war, destroyed the Turkish fleet, established the independence of Greece, defined its boundaries, set up a king, and placed the new state under their collective guaranty.<sup>1</sup> In 1830 when Belgium, which had been united with Holland by the Treaty of Vienna in 1815, withdrew from the union and proclaimed her independence the five great powers in conference at London intervened and compelled Holland against her protests to recognize the independence of Belgium. By the same treaty, renewed in 1839, the powers imposed upon Belgium in the interest of the general peace a régime of perpetual neutrality. Thus the concert made good its claim as the guardian of the peace and public order of Europe.<sup>2</sup> Other instances of intervention and supervision quickly followed. In 1841 the four powers, France declining to join them, intervened in the war between Turkey and Mehemet Ali of Egypt, dictated the terms of settlement which the Porte was required to grant Mehemet Ali and compelled him to agree to accept and maintain in the future the "ancient rule of his Empire" that so long as he was at peace no foreign ship of war should be admitted into the straits of the Bosphorus and the Dardanelles.<sup>3</sup> The action of the powers thus constituted a precedent and at the same time a manifestation of their intention to extend to the orient the rôle of the concert as the guardians of the peace and of the general interests of Europe in that part of the world. A few years later when Turkey was menaced by Russian aggression the French Minister of Foreign Affairs, Drouyn de Lhuys declared: "It is the five powers to which belongs the right to regulate

<sup>1</sup> Details and Documents in Holland, *The European Concert in the Eastern Question*, Ch. 2.

<sup>2</sup> See the details in Dupuis, *Le Droit des Gens*, etc., pp. 108 ff. and 195 ff.

<sup>3</sup> Details and Documents in Holland, *op. cit.*, Ch. IV. See also Dupuis, *op. cit.*, pp. 114 ff.

interests which affect Europe as a whole."<sup>1</sup> In 1853 when the war between Russia and Turkey broke out, Great Britain, France and Sardinia took the side of Turkey and when Russia had been defeated the great powers including Sardinia and Turkey, the latter now being formally admitted to "participation in the advantages of the European public law and concert", arranged the terms of settlement. They included among other things a guarantee of the integrity of the Ottoman Empire, the neutralization of the Black Sea, the regulation of the navigation of the Danube, the fixing of the status of Servia and the Danubian principalities (Wallachia, and Moldavia), etc., all in the general interest and peace of Europe.

In the meantime the powers were occupied with the Greek question. In 1863 the selection of a new King of Greece was confirmed by Great Britain, France, and Russia who re-affirmed the guaranty or the independence of the country and the maintenance of its constitutional institutions. In the same year (1863) the five powers approved the union of the Ionian Islands with Greece "under the sanction of a European act" and in the following year the islands of Corfu and Paxo were neutralized by the same powers. Three years later the powers intervened to prevent a war between Greece and Turkey over the question of Crete which had revolted and demanded to be united to Greece.

<sup>1</sup> Quoted by Dupuis, p. 115. Compare also the following statement of M. Freycinet in the French Chamber of Deputies in 1886 apropos of the Græco-Turk conflict: "In the differences which arise between Turkey and its neighboring states such as Roumania, Servia, Bulgaria, and Greece there is an arbitre which finds itself naturally designated by treaties and by a tradition almost secular. This arbitre is what is called the 'European Concert,' that is, the collective judgment of the six great powers." Quoted in 18 *Rev. de Droit. Int.*, p. 613. Compare the somewhat similar declarations of the Russian cabinet and of M. Hanotaux, then French Minister of Foreign Affairs, quoted by Streit in 32 *ibid.*, p. 12. "The European Concert," said M. Hanotaux, "is the sole tribunal and authority before which everybody must bow."

In 1875 the insurrection in Herzegovina caused the concert to intervene again in the affairs of the Ottoman Empire and again the right of the powers to compel Turkey to adopt measures which they judged proper to safeguard the general peace and interests of Europe as well as to insure humanitarian treatment of Turkish subjects, was solemnly asserted. In agreeing to a conference of the powers Prince Gortchakoff took occasion to say that "Europe had the right and the duty to dictate to the Porte the conditions to which it would consent to maintain the *status quo* created by the Treaty of Paris; and since the Porte was incapable of fulfilling them, it had the right and duty to substitute itself in his place in so far as it was considered necessary to insure the execution thereof."<sup>1</sup> In 1878 the powers revised in important respects the treaty of peace which Russia had sought to impose on Turkey at the conclusion of the war of 1877. Among other things the revised treaty which Russia was compelled to accept recognized the independence of Roumania, Servia, and Montenegro, subject to certain specified conditions which the latter were forced to accept and which involved substantial limitations upon their sovereignty. The revised treaty contained other arrangements by which the powers made good their claim to legislate on matters of European interest. In 1885 when Eastern Rumelia proclaimed its union with Bulgaria the powers again intervened—this time at the request of the Sultan—and in the following year they blockaded a part of the coast of Greece to prevent her from taking up arms against Turkey.<sup>2</sup> In 1897 when an insurrection broke out in Crete and the Greeks demanded that the island be united with the Kingdom of Greece, the powers blockaded the island and when Greece was beaten the concert under the pretext of mediation dictated the terms of peace. In the more

<sup>1</sup> Quoted by Dupuis, p. 120.

<sup>2</sup> See the remarkable notice which they served on Greece, 18 *Rev. de Droit. Int.*, p. 61.

recent years; interventions in the orient, sometimes under the harmless appearing cloak of mediation, have been numerous.<sup>1</sup>

This brief review, which includes only the more important instances, affords a fairly adequate idea of the nature and spirit of the concert, especially in its dealings with the Ottoman Empire and the states formed therefrom. It amounted to an assumption of authority on the part of the great powers to dictate settlements, establish arrangements, and to supervise their execution. The Turkish empire was thus virtually placed under the tutelage of the concert and the claim of any single power to deal alone with that Empire was repeatedly negatived.<sup>2</sup> New states were carved out of it; in some cases their kings were selected with the approval of the concert; their constitutions were submitted to its approval; and their boundaries were fixed by the same authority. Some of them were placed under its guaranty; the rights of provinces which were left nominally under Turkish sovereignty were defined by the concert, etc. Turkey was required to introduce internal reforms and to execute them under the supervision of the powers. The principle of equality and sovereignty of states found little recognition in the numerous conferences which were held to regulate these affairs or in the decisions which were reached. The right thus asserted and exercised by the powers had no legal foundation and no political basis other than the claim that it was the right and duty of those which had the power, to exercise a guardianship in the interest of the general peace and public order. The concert was not always successful in accomplishing these worthy ends; its policy was sometimes marked by intrigue, national selfishness and the desire to satisfy rival ambitions.<sup>3</sup> Nevertheless, fair minded writers

<sup>1</sup> As to the intervention of the powers in behalf of Macedonia in 1905, see 13 *Rev. Gén.*, p. 178 ff. As to their action during the Balkan crisis in 1913, see 15 *Rev. de Droit Int.*, pp. 617 ff.

<sup>2</sup> Compare Holland, p. 2.

<sup>3</sup> See, for example, the article of Georges Streit entitled *Les Grandes Puissances dans le Droit International*, 32 *Rev. de Droit Int.*,

like Dupuis frankly admit that it rendered distinct services to the cause of the general peace.<sup>1</sup> It did not succeed in preventing the wars of 1859, 1864, 1866, 1870-71, 1877-78, nor the wars of 1912 between Italy and Turkey, the recent Balkan Wars nor the World War of 1914-18, but it undoubtedly did prevent the outbreak of hostilities in more than one instance, for example the threatened war between France and Prussia in 1867 over Luxembourg, a war between Greece and Turkey in 1866, and a war between Belgium and Holland in 1831; it served also to restrain Russia from dismembering the Turkish Empire; it compelled the inauguration by the Turkish government of humanitarian reforms in its dominions; it freed Greece, Roumania, Servia, and Montenegro from the Turkish yoke; and it rendered other services which no doubt conduced to the maintenance of peace and order in Europe. Its activities were manifold; through conferences and diplomatic negotiation it settled great questions of general interest to Europe, it made and compelled the acceptance of treaties, it revised others, it fixed the boundaries of states, approved constitutions, confirmed the choice of dynasties, guaranteed the independence and integrity of states, it acted as a mediator and in at least one case as arbitrator; established rules regarding the navigation of rivers, straits and seas; it permitted the dissolution of the unnatural union between Belgium and Holland and forced the latter power to accept its decision; it neutralized Belgium, Luxembourg, the Black Sea and the islands of Corfu and Paxo; it blockaded coasts to prevent hostilities; it sent troops to Syria to pacify disturbances

pp. 5 ff., where the interventions of the concert in the affairs of Greece are discussed and criticized, mainly on the ground that they were in violation of the principle of the equality of states and therefore of a fundamental principle of international law.

<sup>1</sup> *Op. cit.*, p. 124. Compare to the same effect Olney in 1 *Amer. Jour.*, p. 422, who remarks that the conduct of the concert has not always been irreproachable but that on the whole its influence has been for the good of Europe.

there ; it established a system of control over the finances of Egypt and Greece ;<sup>1</sup> it exercised collectively the power of coercion, 'restraint, legislation, supervision and guardianship, over a considerable part of Europe. In short, as Rivier remarks, it virtually ruled Europe after 1815.<sup>2</sup> Altogether it constituted a remarkable record of achievement and it must be admitted that its successes in the interest of the general peace and public order were more numerous than its failures.<sup>3</sup> The concert, however, never developed into an organization. It had no permanent machinery or organs ; it could not therefore act automatically and promptly whenever a crisis arose. It functioned by means of conferences and diplomatic negotiation ; its processes were in consequence slow and cumbersome and for this reason alone sometimes resulted in failure. In each case action had to be preceded by agreement and each power was free to accord or refuse its co-operation. Naturally, agreement was not always possible and not infrequently the action taken was not that of the concert as a whole but of only two or three powers. The limitation of its membership to the small group of great powers (at first five, then six when Italy was admitted to the circle in 1867) gave it an aristocratic character against which the smaller states never ceased to protest. The authority which it arrogated as the guardian of the general peace and the director of European affairs was severely attacked. It was denounced as being in flagrant violation of the principles of the equality and sovereignty of independent states. Its methods were those of intervention in the affairs of weaker states, of dictation and of control rather than of mediation, co-operation and conciliation. Whatever the

<sup>1</sup> As to the control established over the finances of Greece see Politis in 9 *Rev. Gén.* Politis readily admits that the results of the control thus established were good.

<sup>2</sup> *Principes de Droit des Gens.*, Vol. I, p. 125.

<sup>3</sup> Compare the estimate of Dickinson, *op. cit.*, pp. 30 and 308, of Dupuis in his *Le Principe d'Equilibre et le Concert Européen*, Ch. 11. and of Hill, *World Organization and the Modern State*, p. 132.



differences of opinion regarding the moral right of the great powers to exercise this tutelage their claim to do so\* has been made good by a repeated and continuous exercise of their power since 1815. The protests of the smaller powers have been continuously disregarded and they have been compelled again and again to accept the decisions of the concert.

In conclusion it may be said of the European concert that whatever its failures, its abuses, its shortcomings, it demonstrated the value and even the necessity of joint action and co-operation for the maintenance of the general peace. As such it was a notable experiment in the field of international control and it therefore represented a stage in the evolution of Europe from a congeries of isolated and disjointed communities to an organized society of states having reciprocal rights and obligations and governed by a system of law. At the same time, the evident weaknesses of the concert demonstrated the need of an organization which it lacked and consequently of a more effective all-embracing permanent association based upon convention and upon greater respect for the rights of states. This age-long dream of the idealists has now been realized, in part at least, by the establishment of the League of Nations which provides the world for the first time with an organization and with a sort of constitution, however imperfect and rudimentary they may be. Its achievement represents the culmination of a series of historical processes and tendencies which run back of the middle of the nineteenth century. With the increasing solidarity of interests among the nations resulting from the breaking down in large measure of the distances which separated them, through the invention of new and more rapid means of communication and transportation, and the increasing intercourse and multiplication of international relationships which followed it, the development of international law was accentuated and the necessity of international co-operation was intensified. By the middle of the nineteenth century a variety of human interests and activities which formerly were largely local

or national in their range had acquired a character which was international. This was particularly true as regards the postal, telegraph and railway services, sanitation and public health, the repression of so-called international crimes, etc.<sup>1</sup> The efficient administration of these and similar services became matters of vital concern to the international community as a whole. They ran across the boundary lines of states, across continents and across the seas, and therefore required the joint co-operation of the whole society of states to insure the results which the rapidly advancing progress of the world demanded. As this transformation in the economic, financial and scientific life of the world progressed, the idea of international regulation, administration and co-operation grew apace. In numerous fields of human activity the principle of national control began to be replaced by the principle of international regulation. International conferences, official and private, for the discussion of problems of general interest to the community of states and for the elaboration of projects for solving them multiplied with the passing years. Between the years 1826, the date of the Congress of Panama, and the year 1907, when the second Hague Conference assembled, there were held not less than 120 congresses, conferences or meetings composed of official representatives of governments not including those which were concerned with the settlement of a particular war.<sup>2</sup> They were occupied with an almost infinite variety of questions of international concern: privateering, sanitation, postal, telegraph and telephone communication, various matters of maritime law, navigation, sugar duties, the Red Cross, uniformity of monetary

<sup>1</sup> As to the conditions which intensified the necessity for international co-operation see especially Ponisard, *Études de Droit International Conventionnel*; Reinsch, *Public International Unions*, especially, pp. 3 ff.; and Marvin, *The Evolution of World Peace*, Ch. 8. See also an article entitled "International Aspects of Public Health," in 3 *Four. of the Soc. of Comp. Leg.*, pp. 324 ff.

<sup>2</sup> See the list published by Hon. Simeon E. Baldwin in 1 *Amer. Jour. of Int. Law*, pp. 808 ff.

standards, neutralization of states, formulation of rules of war, the metric system, submarine cables, copyrights, patents and trade marks, private international law, railway transportation, interoceanic canals, liquor traffic in the North Sea and in Africa, promotion of the welfare of the laboring classes, suppression of the slave trade, publication of customs tariffs, regulation of fisheries, suppression of epidemic diseases, publication of treaties, the promotion of international peace, repression of the white slave traffic, wireless telegraphy, promotion of agriculture, affairs in Morocco, etc. Since 1907 there has been almost a steady stream of official international conferences for one purpose or another. The number of international conferences and congresses of a private character held during the past century literally runs into the thousands.<sup>1</sup> During the years 1901-1910 there are said to have been held nearly eight hundred.<sup>2</sup> In the year 1913 the number was 174.<sup>3</sup> They included associations of almost every imaginable character; scientific, agricultural, aeronautical, commercial, penological, criminological, educational, geographical, juridical, artistic, racial, philological, labor, literary, medical, promotion of international peace, philanthropic, religious, sociological, etc. They were occupied with almost the whole range of human interests and activities and in general their purpose was to promote the advancement of the particular sciences, arts, or interests with which they were concerned, through discussion, exchange of opinion and experience, organization of international

<sup>1</sup> The list referred to in the preceding footnote mentions some 200 of the more important ones.

<sup>2</sup> The lists may be found in the *Annuaire de la Vie Internationale*, 1910.

<sup>3</sup> *Ibid*, 1913, pp. 561-66. Potter in his *Introduction to the Study of International Organisation* (p. 291) publishes a table of the meetings of private international associations during the successive decades from 1840 to 1914, which shows that the number of such meetings increased from 10 in the first decade to 985 during the decade of 1900-1910 and that during the 4 years preceding the outbreak of the World War there were 485 such meetings.

co-operative agencies, formulation of projects of treaties, legislative acts and administrative regulations, etc. In this way international interest has been stimulated, the sense of solidarity and interdependence accentuated and a world opinion concerning needed reforms developed. Their work has contributed powerfully in some cases toward inducing joint co-operative action on the part of governments by means of which common interests have been brought under international regulation and administration. The participants in these private conferences being unfettered by the instructions of governments and less dominated by official influence have been in a better position to promote the solidarity of the world than have the official congresses which act only as the mouthpieces of the governments which they represent.<sup>1</sup> Altogether, the history and achievements of these international congresses, both official and unofficial, afford one of the most striking evidences of the development of internationalism during the past century, and, it may be added, the increasing interest in international co-operation and regulation.<sup>1</sup> When we remember that prior to the nineteenth century there were no examples of such congresses or conferences, at least for the regulation of purely legal relations between states, and that since the middle of that century there has hardly been a year in which one or more congresses did not take place, we are in a position to realize the extent of the transformation which the society of the states has undergone.<sup>2</sup> The result has been the conclusion of a large number of important multi-lateral treaties to which the

There are now said to be more than 500 recognized international associations. Recently a union or federation of such organizations has been formed at Brussels. In 1922 it embraced more than 230 members. See the list and details in the *Handbook of International Organizations*, published by the League of Nations (Geneva, 1921).

<sup>1</sup> Compare the remarks of Judge Baldwin in his article "The International Congresses and Conferences of the Last Century as Forces looking toward the Solidarity of the World" in 1 *Amer. Jour. of Int. Law*, pp. 565 ff.

<sup>2</sup> Compare Wehberg, *The Problem of an International Court of Justice*, p. 2.

great body of states are parties and which constitute in their totality a remarkable output of international legislation, the quantity and range of which few persons realize.<sup>1</sup> The limits of this lecture permit only a brief reference to the more important of these acts.

Beginning with the Declaration of Paris of 1856 which laid down several important rules relative to maritime warfare and which have received the formal or tacit assent of all nations there has been almost a steady stream of international legislation. It was followed in 1864 by the Geneva or Red Cross Convention (revised in 1906). In 1867 came the treaty of London for the neutralization of the Grand Duchy of Luxembourg; in the following year the Declaration of St. Petersburg laying down certain rules regarding the means which a belligerent may employ for the purpose of injuring his enemy; in 1875 an international telegraphic convention was concluded at St. Petersburg (revised in 1896) and in the same year the convention for the establishment of an international bureau of weights and measures was concluded at Paris; this was shortly followed by the Berlin Act 1878 which was certainly a "law-making" treaty as regards the status of Bulgaria, Montenegro, Roumania, and Servia.<sup>2</sup> In 1881 was concluded a convention regarding precautionary measures against phylloxera and in the following year a convention for the regulation of the fisheries in the North Sea (followed by a new convention in 1889). In 1883 an international convention was concluded at Paris for the protection of industrial property (revised in 1900, 1911 and 1920) and in the following year came the convention for the protection of submarine cables. In the year 1885 was concluded the general act of Berlin relating to the Congo basin which contains various law making stipulations concerning freedom of commerce

<sup>1</sup> As to the increasing multiplication and importance of such treaties see an article in *Clunet* for 1919, pp. 593 ff.

<sup>2</sup> See Bluntschli's article on the work of the Berlin Congress in 11 *Rev. de Droit Int. Pub.*, pp. 33 ff.

and the suppression of the slave trade therein as well as rules relative to future occupation by the signatory powers of territories on the coast of Africa.<sup>1</sup> In the following year (1886) the international convention for the protection of literary and artistic property was concluded at Berne (revised in 1908 and completed by an additional protocol in 1914); also the convention for the international exchange of official documents and of scientific and literary publications and the convention relative to the sealing of railway trucks subject to customs inspection. In 1887 was concluded the convention regulating the liquor traffic among fishermen in the North Sea (followed by others in 1893 and 1894).<sup>2</sup> In 1888 came the treaty of Constantinople providing for the permanent neutralization of the Suez Canal and for the freedom of navigation thereof by all nations.<sup>3</sup> In 1890 was concluded the important act of the Brussels anti-slavery conference providing elaborate measures for the suppression of the slave trade in Africa<sup>4</sup> and in the same year came the convention for the formation of an international union for the publication of customs tariffs.<sup>5</sup> In 1891 were concluded the conventions and agreements relating to the universal postal union (followed by others in 1897 and 1906) and in the following year was concluded the international sanitary convention (followed by others in 1893, 1897 and 1903). In 1898 a convention regarding the tonnage and measurement of vessels for inland navigation was concluded. The 19th century closed with the Hague Peace Conference of 1899 which adopted three important conventions and three declarations, relating to the pacific settlement of

<sup>1</sup> As to its importance as a law making treaty see Martens, article in 18 *Rev. de Droit Int. Pub.*, pp. 244 ff., and Engelhard, *ibid*, pp. 433 ff. and 573 ff. Also Reeves in 3 *Amer. Jour.*, p. 93.

<sup>2</sup> 26 *ibid*, p. 489. Text, pp. 504 ff.

<sup>3</sup> See the article by Dr. Asser in 20 *Rev. de Droit Int. Pub.*, pp. 528 ff.

<sup>4</sup> See Rolin-Jaequaemyns in 23 *Rev. de Droit Int. Pub.*, pp. 560 ff., and Barclay in 22 *ibid*, pp. 320 ff. and 455 ff. See also 15 *Rev Gén.*, pp. 131 ff.

<sup>5</sup> 20 *Rev. de Droit Int. Pub.*, pp. 83 ff.

international disputes, the conduct of warfare on land, and the adaptation of the principles of the Geneva Convention to maritime warfare.

Since the opening of the 20th century the holding of international congresses and conferences and the conclusion of important multi-lateral international conventions of a law making character have greatly multiplied. It must suffice here merely to mention the more important of these conventions and acts. They are the protocol of 1901 between various powers at the conclusion of the so-called "Boxer" insurrection in China in 1900, which contains important stipulations of a law making character regarding relations between the signatory powers and China<sup>1</sup>; the conventions of 1902 relative to the protection of birds useful to agriculture and the protection of minors; the very important international sanitary convention of 1903<sup>2</sup>; the convention of 1904 regarding the exemption of hospital ships from port dues and charges in time of war; the convention of the same year relative to the suppression of the white slave traffic; the convention of 1905 for the creation of an international institute of agriculture at Rome; the conventions of 1906 for the suppression of night work for women and for suppression of the use of white phosphorus in the manufacture of matches; the convention of the same year regarding the unification of pharmacopœial formulæ for patent drugs; the general act of the Algeciras conference relating to Morocco,<sup>3</sup> the new conventions and agreements relating to the postal union and the new Geneva Red Cross convention, all the same year.

The year 1907 saw the meeting of the second Hague Peace Conference, the most important of all the international law making assemblies and the most widely representative. The

<sup>1</sup> In the previous year, 1900, was concluded the international convention for the protection of animals in Africa. 7 *Rev. Gén.*, pp. 519 ff.

<sup>2</sup> 11 *Rev. Gén.*, pp. 193 ff.

<sup>3</sup> 13 *Rev. Gén.*, pp. 175 ff. and 265 ff.

thirteen conventions which it formulated and all of which except one (the convention for the establishment of an international prize court) have been ratified by a large number of states and some of them by practically the entire world, constituted by far the most important contribution ever made by any congress to the body of international law.

The same year saw the conclusion of an agreement among the powers for the establishment of the international office of public health. The years immediately following saw the conclusion of the convention of 1909 regarding the international circulation of motor cars, the convention of 1910 respecting the unification of regulations regarding collisions and salvage at sea, the convention of the same year regarding the suppression of obscene publications and the new convention for the suppression of the white slave traffic.<sup>1</sup> In 1910 was formulated the Declaration of London relative to the rules of maritime warfare but it was never ratified. In 1911 was concluded the pelagic sealing convention between Great Britain, the United States, Japan and Russia for the protection of forbearing seals in the North Pacific Ocean. In 1912 came the important international radio-telegraphic convention, the first to deal with the subject of wireless communication, and in the same year was concluded the international opium convention which, however, was not brought into force until after the close of the world war.<sup>2</sup> In the same year was concluded the convention for the unification of commercial statistics. The same year (1912) saw the conclusion of a new and elaborate international sanitary convention at Paris which was signed by 65 plenipotentiaries<sup>3</sup> and in 1914 an important convention for the safety of life at sea was concluded but was not ratified owing to the outbreak shortly afterwards of the World War. Naturally the years of the World War produced little or nothing in the way

<sup>1</sup> See *Rev. Gén.*, pp. 499 ff.

<sup>2</sup> 10 *Amer. Jour.*, pp. 126 ff.

<sup>3</sup> 21 *Rev. Gén.*, pp. 390 ff.



of international legislation though it powerfully stimulated co-operative action among the allied states on each side and demonstrated its value. In fact the allied and associated powers constituted a "league of nations" for the purpose of prosecuting the war. The peace conference which followed the close of the war was only incidentally a law making assembly in the proper sense of the term. The treaties of peace dealt primarily with the terms which the victors saw fit to dictate to the vanquished powers. Nevertheless they contained many stipulations, as I have pointed out in another lecture, which fall within the category of international legislation. This is notably true of the provisions of the Covenant of the League of Nations, and of such stipulations as those relating to labor, mandated territories, nationality, rivers, canals, servitudes, division of debts, effect of the war on contracts and treaties, responsibility of offenders against the laws of war, etc.

In addition to the treaties of peace the Paris Conference was responsible for the conclusion of a number of other important conventions which were distinctly of a law-making character. Such were the international air convention of 1919, which I have already discussed in another lecture, and the convention signed at St. Germain on September 10 the same year, which abrogated the General Act of the Berlin Congo Conference of 1885, and the Brussels anti-slavery act of 1890, and replaced them with new arrangements. Another convention was signed on the same day, and at the same place for the restriction of the liquor traffic in the African territories (with certain exceptions) subject to their control. Still another important convention of the kind was that signed at St. Germain on the same date by the plenipotentiaries of 24 powers for the control of the trade in arms and ammunition. By this convention the contracting parties undertake to prohibit the export of various kinds of arms and apparatus used in war, and to prohibit absolutely the exportation of arms the use of which is forbidden by international law. They further

undertake to prohibit, except upon license, the importation of the types of arms referred to above, into various territories in Africa, Asia, and elsewhere. The treaty contains elaborate provisions for the control and supervision of the trade in arms and ammunition within the prohibited areas both by land and sea and provision is made for the establishment of a central international office under the control of the League of Nations for the collection and preservation of documents relating to the trade in arms and ammunition.<sup>1</sup> Other multi-lateral law-making treaties which may be said to have owed their existence to the peace conference were those between the allied and associated powers on the one hand, and Poland, Czecho-Slovakia, Jugo-Slavia, and Roumania, on the other, relative to the protection of minority races and nationalities and trade within the territories of the latter states. Finally, there is a group of international labor conventions adopted by the labor conferences held at Washington in 1919, at Genoa in 1920, and at Geneva in 1921, under the auspices of the League of Nations. They deal with the employment of children at sea, and in certain industries on land, the employment of women in night work, reduction of hours of labor in certain industries, the establishment of free employment agencies, and a variety of other matters for the amelioration of the condition of the laboring classes.<sup>2</sup>

This enumeration of multi-lateral conventions shows that, in spite of the lack of an international legislative organ, the world has been provided through the agency of conferences and diplomatic negotiation with a large body of legislation dealing with a great variety of matters of common interest to the

<sup>1</sup> Texts of the three above mentioned treaties of Sept. 10, 1919, in 15 *Amer. Jour. of Int. Law*, pp. 297 ff.

<sup>2</sup> A good summary of the work of the first two conferences, by Mr. C. N. Gregory, may be found in 15 *Amer. Jour. of Int. Law*, pp. 42 ff. Details as to the work of all three conferences with discussions of the draft conventions may be found in *Research Report No. 48* (April, 1922) of the National Industrial Conference Board.

society of states: railway, telegraph, wireless, and postal communication; transportation and navigation by land, river, canals, the air and the sea; the protection of literary, artistic and industrial property; the amelioration of the conditions of the laboring classes, especially of women and children;<sup>1</sup> the repression of so-called international crimes such as slavery, the slave trade, the white slave traffic, the liquor traffic among fishermen in certain seas and in certain regions of Africa, the use of harmful drugs and the circulation of obscene publications; the protection of the public health and the promotion of more wholesome sanitary conditions; the neutralization of states, and of interoceanic canals; the conduct of war on land, on the sea and in the air; the promotion of agriculture; the protection of fur-bearing seals; restrictions on the traffic in arms and ammunition, the protection of minority races and nationalities in countries where they have formerly been subject to discrimination and persecution; the protection of backward peoples in Africa and Asia who have been placed under the control of mandatory powers, and numerous other matters. It is quite true that not all of the conventions referred to have been generally ratified. A very few of them have not been ratified at all; some of them have been ratified only by a small number of powers but a large number have been ratified by virtually all the members of the international community. Altogether, it is a remarkable achievement and furnishes a striking illustration of the solidarity of interests which exists

<sup>1</sup> In addition to the multi-lateral conventions dealing with labor there is also a large number of bilateral conventions between particular states, more than 20 altogether, so that we have to-day a large body of international labor legislation in the form of bilateral and multilateral conventions. The extent and importance of this legislation may be seen from a study of Mr. B. E. Lowe's book *The International Protection of Labor* (1921). See also Solano (Ed.) *International Labor Legislation* (1920), Raymond, *Droit Int. Ouvrier* (1906), and articles in 13 *Rev. Gén.*, 628 ff.; in 37 *Rev. de Droit Int. Pub.*, pp. 442 ff. and 543 ff.; 43 *ibid*, pp. 160 ff. and 44 *ibid*, pp. 388 ff.; *British Year Book of Int. Law*, 1920-21, pp. 191 ff. See also Woolf, *Int. Government*, pp. 298 ff., and Hicks *The New World Order*, pp. 236 ff.

to-day among the different states of the world. The world has become literally knit together by a vast network of international conventions some of which, such as those dealing with sanitation, have much of the character of elaborate municipal acts of legislation enacted by particular states. As I shall point out in the lecture on Codification, considerable progress has also been achieved in the direction of securing uniformity of legislation especially among European states in respect to various matters falling within the field of private international law, notably as regards marriage, divorce, inheritance, guardianship of minors, bills of exchange, the execution of foreign judgments, civil procedure, marine insurance, etc. This has been brought about through the efforts of a series of conferences held at the Hague since 1893 which formulated conventions dealing with the abovementioned matters and which were recommended to the different states for ratification. Some of them have been ratified by a considerable number of continental European states though neither Great Britain nor the United States have ratified any of them. Through the activities of the International Maritime committee organized in 1898, which maintains a central office at Antwerp, noteworthy efforts have been made in the direction of the unification of maritime law. It drafted two international conventions dealing with maritime salvage and collisions at sea which were laid before a series of diplomatic conferences called at its suggestion in 1905, 1909, and 1910 and which approved them in 1910.<sup>1</sup>

With the increasing interdependence of states and the growing conviction of the necessity of co-operation there has gradually come to be created a large number of international offices, bureaus, commissions, institutes and other organs with different names, charged with the promotion, administration or supervision of particular interests or services which had in the course of the development of the economic and social life of the world

<sup>1</sup> See the summaries in Woolf, *International Government*, p. 269, and Hicks, *The New World Order*, pp. 239-241.

become international in their range and effect. By means of conventions the world has been organized into what are popularly called "public international unions" each with an organ of some kind, deliberative, legislative or administrative. The multiplication of these "unions" has rapidly increased in recent years so that there are now more than forty of them, not to mention others which do not strictly fall within the category of official administrative unions.<sup>1</sup> Dealing with services of communication and transportation we have the telegraphic, wireless telegraphic, submarine cable, postal and railway freight unions, and the automobile conference to which may now be added the international commission of air navigation. Occupied with economic interests are the metric union, the unions for the protection of literary, artistic and industrial property, the international labor office, the institute of agriculture, the bureau for the publication of customs tariffs and the sugar commission; dealing with public health and sanitation is the international public health office; with police, penology, crime and morals we have the bureaus, offices, conferences and commissions on the traffic in opium, spirituous liquors in Africa, arms and ammunition, the white slave traffic, repression of slavery and the slave trade and the international prison congress; with the promotion of scientific interests there is the international geodetic association, the seismological union, the international committee on the map of the world, the council for the exploration of the sea, the Pan-American scientific congress and others. In addition, there are various miscellaneous international

<sup>1</sup> Potter in his *Introduction to the Study of International Organisation* (1922), p. 271, gives the names of 45 as being in existence in 1915. Several have been created since 1915 notably the International Air Commission, the Central International office for the control of the trade in arms and ammunition, the International Labor organization of the League of Nations, and the international bureau of patents (1920). Other lists may be found in Reinsch, *Public International Unions* (1911); in Woolf *International Government* (1916); Sayre, *Experiments in International Administration* (1919) and Poincard, *Etudes de Droit International Conventionnel* (1914).

bureaus or organs such as the bureau of the Hague tribunal of arbitration, the Pan-American Union, etc.

There is no uniformity in the organization of these "unions." Some of them are provided with permanent deliberative or quasi-legislative organs conjoined with administrative organs, while some function through the agency of periodic conferences in conjunction with permanent international bureaus, offices or commissions. Some of the organs have little or no power of control and, subject to a few exceptions, they can take no action which is binding upon the member states without their consent, though in some cases they may make regulations of far-reaching effect. The congresses or conferences for which provision is made in all cases have only the power to discuss, exchange opinions, and prepare draft conventions which are submitted to the member states in the form of recommendations.<sup>1</sup> In some cases there is a commission which performs duties somewhat analogous to the board of directors of a private commercial or industrial concern. In all cases there is a permanently organized bureau or office with a seat (usually at Geneva, Berne, Brussels, Paris, or Rome) and with an administrative staff. The expense of maintenance, with a few exceptions, is borne by the member states in common according to a basis of apportionment provided for by the convention creating it. The great majority of these so-called public international unions have come into existence during the past half century and in the more recent years the number has greatly multiplied. It is significant that not one existed prior to 1804, when the central Rhine commission was created, and no one of really great importance was established before 1863, when the postal union was organized. Some of them, notably the latter, embrace within their membership virtually all the states of the world. The practical

<sup>1</sup> The Sugar Commission appears to be the only international organ with power which is legislative in effect. While it is given no direct power of legislation it is empowered to determine facts regarding the granting of bounties on sugar, which when found to exist, makes it obligatory on the member states to introduce certain changes in their tariff laws.

results which they have achieved have varied. A few have been failures, others like the postal union have rendered services of a highly important character to the world. The chief reason why they have not accomplished more is due to the fact that their organs have been given little real power of legislation, administration or control. As essays at international organization and administration they are more or less rudimentary and primitive in character and constitute in their entirety only a transitional stage in the evolution of the world toward an organization of a more general and thorough-going character. Their creation was a response to the increasing need of joint co-operation for the advancement of certain common interests; imperfect as they are, they afford a fund of experience and have demonstrated the value and the possibilities of a more comprehensive and all-embracing international organization. The conventions by which they were created, whatever may have been the effect of the world war upon their status were, with one or two unimportant exceptions, revived by the treaties of peace and again brought into operation. Their usefulness was recognized by the founders of the League of Nations who left them undisturbed by the new organization and with a view to co-ordinating their work and bringing them under the high patronage of the League, the covenant provided (art. 24) that the bureaus of those already in existence should be placed under the direction of the League, if the parties to the treaties creating them would so consent. It was further provided that all international bureaus and commissions for the regulation of matters of international interest, created in the future, should likewise be placed under the direction of the League.<sup>1</sup>

The creation of the so-called public international unions with the congresses, conferences, bureaus, commissions and

<sup>1</sup> The best studies of the history, development and activities of the so-called public international unions with discussions of the needs and conditions which led to their creation are the books of Reinsch and Poincard referred to above. The work of Poincard though not up to

offices mark a stage, as I have said, in the evolution of the society of states toward a more perfect organization. They are unions for very limited purposes and are mainly administrative or scientific rather than political in character. The most important of all the objects of international organization and co-operation, namely, the preservation of the general peace, lies entirely outside their province. The next stage in the evolutionary process was the organization of a union for the promotion of this great object. The tragic events of the World War created an almost universal conviction in favor of such an organization and long before the end of the war had arrived, far-sighted statesmen like President Wilson realized that the world was confronted by the alternative of devising some organized system of co-operation for the maintenance of the peace in the future or of seeing a possible breakdown of civilization itself. He and others insisted from the outset that a settlement limited to territorial readjustments, the freeing of subject races from oppression, the exaction from the vanquished of indemnities and reparations for damages, the punishment of those responsible for the war and similar dispositions, would not be an adequate settlement. At best it would be only a truce rather than a permanent peace. The peace conference therefore should in addition to laying down the conditions upon which hostilities would be terminated, create an organization and establish machinery and processes for safeguarding, so far as possible, the future peace of the world.<sup>1</sup> It was a high and

date is particularly valuable from the historical point of view. Woolf's and Sayre's studies contain analyses of the unions from the point of view of their organization and functions as governmental agencies. The works of Potter and Hicks contain less detailed but excellent summaries.

<sup>1</sup> See notably President Wilson's address of January 22, 1917, before the United States Senate and his liberty loan address of September 27, 1918. In the former address he declared it to be "absolutely necessary that a force be created as a guarantor of the permanency of the settlement, so much greater than the force of any nation now engaged or by alliance hitherto formed or projected, that no nation, no probable combination of nations could face or withstand



noble conception and one which found a hearty response in the sentiments of millions who had fought, and made sacrifices throughout the long and trying years of the war. Never before had public sentiment so generally demanded action of this kind and probably never again would the opportunity be greater. The history of the war, as I have said, had abundantly demonstrated the value and the possibilities of international co-operation. Inter-allied executives, councils and commissions of one kind or another had been established and the war had been carried on by the allies under a common command.<sup>1</sup> It was mainly through co-operation of this kind that the war had been won; it should therefore be continued, extended and permanently organised after the conclusion of the war for the maintenance of peace in the future. It was in response to this sentiment that the peace conference undertook the organization of the League of Nations. The League represents the highest achievement that has yet been attained in the evolution of the society of states toward a legal organization, though it can certainly not be admitted to constitute the final stage.

The League differs materially from the old Directorate of the four (subsequently five) great powers which existed from 1814 to about 1823; from the Concert of the great powers which succeeded the dissolution of the Directorate, and from the various public international unions which have been created for specific and limited purposes. The principal features which differentiate it from the Directorate and the Concert are its

it." "If the peace presently to be made is to endure," he added, "it must be a peace made secure by the organized major force of mankind." In the latter address, speaking of a league of nations as an "indispensable instrumentality" of a "secure and lasting peace" he expressed the opinion that its constitution must be a part—in a sense the most essential part—of the peace settlement itself.

<sup>1</sup> See the list of these allied organizations in Hicks, *op. cit.*, p. 204. See also Marrow on the Machinery of International Co-operation during the World War, in Duggan (Ed.) *The League of Nations*, Ch. 3, where their influence upon the League of Nations movement is described.

wider membership and consequently its more democratic basis and also its organized character. It differs from the public international unions both in organization and purposes. It is more than a mere alliance or "concert" in that it possesses a sort of constitution which creates common organs and defines their powers. On the other hand, it is not what it has often been declared by its critics to be, namely, a "super-state" erected over the member states which compose it.<sup>1</sup> It is not a state at all, much less a super-state, because it lacks the most essential constituent element of a state, namely, sovereignty. It possesses no territory, no subjects or citizens, no armed forces of its own, no real power of legislation. For the most part, resolutions taken by its legislative and executive organs (the assembly and council) require the unanimous concurrence of its members and with only a few exceptions they are nothing more than recommendations or proposals. Its judicial organ, the permanent court of international justice, has, apart from what has been conferred by special treaty stipulations, no obligatory jurisdiction. It can therefore take cognizance only of cases that have been voluntarily submitted to it by the parties. The League does not displace or supersede the sovereignty of any state or interfere with its internal organization or life processes. Membership in the League is a purely voluntary matter and the right of withdrawal is expressly recognized. Every state is therefore entirely free to assume the obligations which the covenant creates or to refuse to do so in its discretion and once having undertaken them it is free to terminate them by withdrawal upon notice. Now these are not the ear-marks of a state. The League is, as Larnaude remarks, rather an association, a syndicate of states, a sort of *co-opérative d'Etats*. Nevertheless, the League of Nations must be admitted to possess certain of the attributes of a state ;

<sup>1</sup> Compare as to this point, Larnaude, *La Société des Nations* (1920).

perhaps we may say that it is a state in the process of making, like the old confederations of the past all of which ultimately evolved into states because they proved to be hopelessly inadequate and ineffective to accomplish objects which only states can accomplish. It possesses a real juridical personality with a sort of constitution and with organs of its own, a seat or capital, its own buildings and other property; it has a treasury and a budget; it has a staff of officers and employees all of whom enjoy diplomatic privileges; it may enter into contracts and other legal relations, equally with states or individuals; there would seem to be no reason why it may not accept legacies or gifts; it can no doubt bring actions in the Swiss Courts, etc.<sup>1</sup>

The League of Nations differs, as I have said, from the old Directorate of 1814-1823 and from the European Concert which succeeded it, in that its membership is not limited to the small group of so-called great powers. It was apparently the intention of the authors of the Covenant that the right of membership should be extended ultimately to all states and even to all self-governing dominions or colonies, capable of fulfilling the obligations which membership entails, that is, it should be a universal association. Not all states however, were to be admitted in the beginning and as a matter of right. According to the Covenant there were to be in fact three classes of members: <sup>1</sup> original members, consisting of the allied and associated powers who were signatories to any one of the five treaties of peace and which were named in the annex to the Covenant (27 states, the four self-governing

<sup>1</sup> In 1921 a Swiss court, however, held that it had no jurisdiction in the case of a suit brought by a local furnisher to recover on a contract between himself and the League Administration. As to the juridical character of the League see the illuminating article by M. Grunebaum-Balin in 44 *Rev. de Droit Int. Pub.* (1921), pp. 67 ff. He compares the League as a juridical personality, to the papacy which has no territory or army and which though not a state like other states has certain of the attributes of a state. Like the papacy it may

dominions of Australia, Canada, South Africa, and New Zealand and also India: total 32); (2) original members consisting of 13 neutral states, the so-called "good neutrals" named in the annex, which might within two months accede without reservation to the covenant; and (3) elected members, which embraced the five former enemy states, Russia and the states recently formed therefrom and various neutral states such as Mexico, Costa Rica, San Domingo and various petty states of Europe and Africa. States within the third group could gain admission only by election by a two-thirds vote of the assembly and then only when they had given "effective guarantees" of their sincere intention to observe their international obligations and to accept such regulations as might be prescribed by the League in regard to their military, naval, and air forces and armaments. Unlike the states in the first two groups, they were not considered eligible to membership as a matter of right, but must ask for admission the five enemy powers because of the distrust in which they were held, Russia for reasons connected with her disorganization, and the others because either their pettiness of size or backwardness of civilization made it questionable whether their membership was desirable.<sup>1</sup> Thus an inequality was established between the states in the first two groups and those in the third group both as regards the conditions of eligibility and the procedure of admission to membership.<sup>2</sup> Once admitted.

therefore be properly characterized as "an artificial person of international law." He suggests that for the purpose of settling legal controversies between the League and private individuals it should follow the example of the Papacy in 1882 and establish a special court of its own to hear and determine such cases (*ibid*, p. 81).

<sup>1</sup> There was considerable sentiment in favor of opening the doors of the League at the outset to all sovereign states without restriction, including former enemy states. This was the substance of one of the amendments proposed to the Covenant by the Argentine delegation to the Assembly in September 1921, for the rejection of which by the assembly the Argentine delegation withdrew.

<sup>2</sup> The advantages of original membership are, aside from the mark of confidence and moral position which it carries, that it is not

however, they are on a footing of substantial equality with their fellow members in respect to rights and obligations, so that it may be said of the League of Nations that it is in the main an association of equals. The only exception to this statement is to be found in the exemption which Switzerland has been accorded in regard to the obligation of the members to furnish armed quotas and to allow the passage of troops through their territories in case the League finds itself obliged to resort to the use of force for the execution of its covenants.<sup>1</sup> In this respect Switzerland enjoys a privileged status which none of the other members have. Luxembourg desired admission to the League with a similar reservation as to her neutrality but in view of the opposition withdrew her request. Although being like Switzerland a neutralized state her neutralized status was different from that of Switzerland in being an unarmed neutrality; she was not therefore in a position to defend her neutrality. Under these circumstances there were not the same reasons for exempting Luxembourg from the obligation to allow

dependent upon the pleasure of the assembly and is unconditional in that original members preserve their freedom in respect to the measures taken by the council concerning the limitation of armaments (Arts. I and VIII).

<sup>1</sup> Switzerland's situation was peculiar in view of her permanently neutralized status under the treaty of 1815. By Article 435 of the treaty of Versailles the contracting parties recognized that the guarantees of the treaty of 1815 relative to the neutralization of Switzerland constituted "international obligations for the maintenance of peace." Switzerland desired to become a member of the League but wished to preserve her neutralized status. Upon petition to the council of the League the latter body adopted a resolution declaring that "the perpetual neutrality of Switzerland and the guarantee of the inviolability of her territory, as incorporated in the law of nations, particularly in the treaties and in the Act of 1815, are justified by the interests of general peace and as such are compatible with the covenant." It was understood, however, that while she would refuse to participate in the military operations of the League or admit the passage of foreign troops through her territory she would participate in the economic measures taken by the League against a covenant-breaking state. See *World Peace Foundation* pamphlet, Vol. III, No. 6 (Dec. 1920), p. 263. See also Metettal, *La Neutralité et la Société des Nations* (1920), especially Ch. II;

the passage of the League forces through her territory.<sup>1</sup> Belgium's neutralized status having been terminated by the treaty of Versailles she made no request for a similar exemption. The Scandinavian states demanded a similar exemption in regard to the obligation relative to blockade measures of the League but it was refused.<sup>2</sup>

Of the states in the first group, all except the United States ratified one or the other of the treaties and became thereby automatically members of the League.<sup>3</sup> The thirteen states in the second group all became members by accession to the covenant. Among those in the third group Austria, Bulgaria, Albania, Finland, Luxembourg and Costa Rica were elected to membership by the Assembly in 1920; in 1921 the three Baltic states, Latvia, Esthonia, and Lithuania were admitted and in 1922 Hungary was admitted. There was some opposition to the admission of the former enemy states Austria and Bulgaria on the alleged ground that they had not fulfilled certain of their obligations under the treaties of peace and had not given the guarantees required by Article 1 of the Covenant but the objections were not serious and in the end were waived. There was also some opposition to the admission of Albania for the reason that its international status was unsettled and the committee of the Assembly to which the matter was

Borgland, *La Neutralité Suisse au Centre de la Société des Nations* (1920); Moriand, *La Société des Nations et la Suisse* (1919) and Borel, *La Neutralité de la Suisse au Sein de la Société des Nations*, in the *Rev. Gén.*, 1920, pp. 153 ff.

<sup>1</sup> See *World Peace Foundation* pamphlet, *The First Assembly of the League of Nations*, Vol. IV (Feby. 1921), p. 150.

<sup>2</sup> Nevertheless in 1921 the assembly approved an amendment to Article 16 of the covenant relating to the blockade of covenant-breaking members so as to authorize the council to exempt a particular member from the obligation to participate in the blockade whenever it considered that the proximity of such member to the covenant-breaking state would put it in a position of grave danger.

<sup>3</sup> China like the United States refused to ratify the treaty of Versailles but her ratification of the treaty with Austria made her a member of the League.

referred reported in favour of the postponement of its admission until its status had been definitely fixed ; but it was overruled by the Assembly. Objection in principle was also raised against the admission of various petty states, such as Luxembourg and the states of the Baltic and Caucasus regions, which by reason of their small size and lack of resources, it was said, were incapable of performing all of their obligations as members of the League, and the suggestion was made by Mr. Fisher of England whether a minimum limit should not be fixed with regard to the extent and population of states which should be admitted. In the case of Luxembourg, however, it was pointed out that she had participated on a footing of equality with the other states at the Hague conference of 1907, while other petty states, such as Haiti, Hedjaz, Liberia, and Siam had been admitted as original members by the terms of the Covenant. There was no place, it was argued, for distinguishing between large and small states, so far as the right of membership in the League was concerned. The only proper test of eligibility was whether the state satisfied the conditions of Article 1 of the Covenant relative to giving effective guarantees of its sincere intention to observe its international obligations. To require more would constitute an amendment of the Covenant. In view of the fact that the newly organized Baltic and Caucasus states were, in consequence of their proximity to Soviet Russia, whose population was not "amenable to the influence of the League," likely to require the guarantee of the League in accordance with Article X of the Covenant, Lord Robert Cecil proposed that these states be admitted under the condition that in the discharge by the League of its obligations under Article X, regard must be had to this circumstance.<sup>1</sup> It was pointed out, however, that the

<sup>1</sup> Lord Robert Cecil took the position that no state ought to be admitted to membership unless all the members of the League were prepared to "march to its assistance" in case of attack. He was by no means certain whether South Africa, for example, would be willing

admission of certain states subject to conditions which would deprive them of the protection of the League would establish an inequality between the members, so that the League would cease to be an association of equals in respect to the right of protection. No state therefore should be admitted to membership unless the League was prepared to protect its territorial integrity and independence against external aggression equally with that of other members.

The question of the right of the assembly to admit states under condition was also raised in connection with a proposal that states seeking admission should be required to give guarantees for the protection of racial and linguistic minorities in their territories, such as Poland, Czecho-Slovakia and other states had undertaken through special treaties between them and the allied and associated powers. Doubt being entertained, however, as to the legality of the imposition of such a condition as well as to the advisability of it as a matter of policy, the Assembly contented itself with the adoption of a recommendation that, thereafter, states applying for admission to the League should enter into the same obligation as that which the above-mentioned states had by treaty undertaken in respect to the protection of minorities. In pursuance of this recommendation Finland in her application for admission to the League stated that she was prepared to give such an undertaking and would

to send a force to protect certain of the dangerously exposed petty states which it was proposed to admit to the League. Mr. Fisher opposed the admission of such states as Georgia because he feared the members would not treat their obligations under Article X seriously. "We must either," he said, "treat the League of Nations seriously or not. If we treat the League seriously we must treat the Covenant seriously, and if we treat the Covenant seriously, we must treat our obligations under the tenth article of the Covenant seriously. It is because I do treat the Covenant seriously that I earnestly ask the Delegates in this Assembly to consider, when they are voting on the admission of a new state, whether they are prepared to take the responsibility of advising their respective governments to come to the assistance of that state in the hour of need. We must vote not as sentimentalists but as responsible statesmen."



collaborate effectively and sincerely in the realization of the objects of the League in respect to the protection of minorities. Her admission to the League under this promise can hardly be said to have placed her on a footing of inequality with the other members.

Under the terms of Article I of the Covenant the Assembly was left full power of discretion in respect to the admission of new members the only condition being that the state admitted should be required to give effective guarantees of its sincere intention to observe its international obligations and accept the regulations prescribed by the League in regard to its military, naval and air forces and armaments. In regard to the admission of former enemy countries the committee on admissions states that it adopted two criteria in arriving at its decisions : (1) Whether they had complied with their obligations under the treaties of peace, and (2) whether since the armistice, they had shown any sincere desire to comply with them. Applying these tests of eligibility, Austria and Bulgaria were admitted whereas Germany, Hungary,<sup>1</sup> and Turkey were not, although the two first-named powers are understood to have desired admission. As regards the group of smaller states, Luxembourg, Costa Rica, and those formed from territories belonging to the Russian Empire, the committee took into consideration various factors such as whether the governments thereof were stable and recognized as *de jure* or *de facto* organizations, whether they were self-governing states, their size and population, their conduct, including their acts and assurances in respect to their international obligations and the prescriptions of the League regarding armaments, etc. Taking into consideration these elements the Assembly admitted as mentioned above, 8 small states but refused to admit a number of others. Liechtenstein, Monaco, San Marino, and Iceland were denied admission, apparently because of their small size

Hungary has since been admitted (1922).

and population. At the time their admission was refused, the Assembly adopted a resolution expressing a desire that the special committee appointed by the council to consider proposed amendments to the covenant should be requested to consider the question whether it would be possible to "attach" to the League sovereign states which by reason of their small size were not eligible to membership.

At the present time the actual membership of the League embraces 30 original members, constituting all the allied and associated powers except the United States and Ecuador, who were signatories either to the treaty of peace with Germany or Austria: the 13 acceding states named in the Covenant (which are also original members), and nine elected members: total fifty-two. This leaves outside the League the United States, Germany, Turkey, Soviet Russia, Mexico, San Domingo, Iceland, Georgia, Abyssinia, Afghanistan, Armenia, Azerbaijan, Ukraine, Liechtenstein, Monaco, and San Marino.<sup>1</sup> To this list might also be added certain states such as Palestine and Syria whose "existence as independent nation," can, in the language of the Covenant, be "provisionally recognized" but which have been placed under the guidance and tutelage of other powers as mandatories. The total population of the states now members of the League exceeds 1,000,000,000; that of the states not members about 300,000,000. It is understood that Germany will be admitted in the near future. Whether Turkey will be admitted is doubtful. As soon as Mexico has an established government which is generally recognized it will probably be admitted and the same may possibly be said of

<sup>1</sup> A complete list of the members may be found in the monthly summary of the League for Oct. 1921, p. 140. The delegation of Argentina withdrew from the assembly of the League in December, 1920 because the assembly refused to consider at the time certain amendments it proposed to the Covenant. But it does not appear that Argentina has actually withdrawn from membership in the League though its continued refusal to participate in the Assembly would practically have that effect.

San Domingo. The Soviet government of Russia is distinctly hostile to the League and is not likely to ask for admission. The present government of the United States has also shown itself unsympathetic towards the League in its present form, and has given no indication of its desire or intention to join under any conditions. So far, it has refused to send representatives to the conferences called by the League, to participate in its technical organizations, to ratify the statute of the permanent court of international justice, to consent to the placing under the supervision of the League certain international bureaus and offices established by conventions to which it is a party and, in general, has declined to co-operate with the League in its measures for the suppression of the traffic in opium, the white slave traffic, the restriction of the traffic in arms and ammunition, the reorganization of the international public health office, etc.<sup>1</sup> While the number of states remaining outside the League is relatively small and most of them are of little importance several of them are of such vast importance in the society of states that their absence leaves the union still very far from being complete. Germany and Russia alone contain within their boundaries more than half the total population of Europe and the refusal of the United States, which by reason of its vast extent of territory, resources and population, deprives the League of a member whose co-operation would be especially helpful, though it is not absolutely essential. Of the few states remaining outside the League most of them remain out because they have been denied

<sup>1</sup> See an article entitled "League Hampered by America's Delay," in the *New York Times*, Oct. 1, 1921, and an article by Raymond Fosdick, *ibid.* Sept. 18, 1921, pp. 6 and 30. Germany though denied membership, has on the other hand, sent delegates to the Labor Conferences held under the auspices of the League at Genoa and Geneva, to the financial conference at Brussels, to the communications conference at Barcelona, to the white slave conference at Geneva and to the Aaland Islands neutralization conference at Geneva. See a letter of Prof. Manley Hudson in the *New Republic*, Feby. 15, 1922, p. 342.

admission; the United States and Russia (or to speak more accurately, their governments) stand practically alone in not desiring membership and in refusing to associate themselves in any way with the League in the work which it is undertaking.

Before leaving the discussion of the subject of membership in the League it may be remarked that membership may be lost in three ways: first, a state may withdraw upon two years' notice provided all its international obligations and all its obligations under the Covenant have been performed at the time of withdrawal; second, a state which signifies its dissent to a duly ratified amendment to the Covenant ceases to be a member; and third, any member which has violated any covenant of the League may be declared to be no longer a member, by a vote of the council and the assembly. Under the first provision a dissatisfied member cannot by withdrawal avoid any obligations which have already accrued but it may by withdrawal free itself of future obligations. Thus the right of secession is fully recognized and the door to the ultimate voluntary dissolution of the League is left open. The third provision very properly gives the League the power to rid itself of undesirable members. The very foundation of the League consists of a series of covenants or obligations the scrupulous performance of which by the members is the chief essential to its success. There is, therefore, no place in it for covenant-breaking members and it was necessary that provision should be made for excluding them. The requirement of a unanimous vote of the council and the assembly, not counting the vote of the covenant-breaking member, insures that arbitrary expulsions are hardly likely to take place.

The limits of this lecture do not permit of a detailed discussion of the organization of the League. It must suffice to say, what everyone knows, that its principal organs are a council, an assembly and a permanent secretariat. The recent establishment of a permanent court of international justice provides the League with a judicial organ. Though created

under the auspices of the League by the council and assembly of which the judges are chosen and out of whose treasury they are paid their salaries, the court is open to states not members of the League. In this sense therefore it is not exclusively an organ of the League. There is also a permanent Labor organization the members of which consist of members of the League. It was provided for, however, not by the Covenant but by the treaties of peace.<sup>1</sup> It consists of a general conference of the representatives of the League and an international Labor Office controlled by a governing body representing governments, employers of labour and working men. Finally, there is a variety of permanent commissions, the more important of which are those on the limitation of armaments, mandates, air navigation, the navigation of international rivers, etc., to which may be added the various international bureaus, offices and commissions created by the Covenant or the treaties of peace or by earlier conventions, and some of the latter of which have been placed under the supervision of the League. Altogether the League has a very elaborate and extensive organization. The council, as is well known, is a small body composed at present of representatives of only nine powers, but the number of which may be increased by the council with <sup>2</sup> the approval of the assembly, and this is likely to be done with the admission of some of the great powers now outside the League, in order to provide representation for them. The assembly, on the other hand, is a large body consisting of representatives of all the member states. The members are thus on a footing of equality in respect to representation in the assembly but of inequality in regard to representation in the council since only nine of the 52 members are represented in the latter. Since India and the four self-governing dominions of Great Britain

<sup>1</sup> See Arts. 387 ff. of the treaty of Versailles.

<sup>2</sup> In 1922 three additional states were admitted to representation on the Council, as non-permanent members.

are members of the League and are therefore represented in the assembly there is a certain inequality of representation as among *states* in that body also, since the British Empire thus has six votes in the assembly whereas other states, even those with extensive colonial possessions, have only one. This inequality of representation in the assembly so far as *states* are concerned was the subject of much criticism in the United States and was undoubtedly one of the reasons which has led the United States to refuse to join the League. France and other states having colonies, to which no representation was allowed, did not, however, raise serious objection to the alleged inequality of treatment. It must be admitted that the objection made in the United States was not as well-founded as it has seemed to some critics. In fact, India and some of the British self-governing dominions are vast countries with extensive populations and are in many respects in the position of independent nations. Much may be said therefore in favor of allowing them representation in the assembly which cannot be said in favor of the colonial possessions of the United States and France and other countries, which are not self-governing and which have no attributes of independent states. In the second place, the rule of unanimity which is required in respect to practically all important decisions taken by the assembly, in fact, reduces the inequality to very narrow proportions. It makes no practical difference therefore whether Great Britain controls six votes or one, so long as any other state may prevent action by the assembly. In fact it has turned out that the British government has been unable to control the votes of India and the self-governing dominions. For example, on the 16th of December, 1920, the six votes of the Empire were divided on nearly every question upon which the assembly was called to vote. South Africa and Canada voted against Great Britain on the proposal to admit Georgia to the League; Canada voted against South Africa and Great Britain on the question of admitting Armenia

and Australia abstained from voting on the admission of Bulgaria which was favoured by other British delegates.<sup>1</sup> Other similar divisions have occurred. It may not be improper to remark, in view of the American objection, that in case the United States were a member, it is not at all improbable that it would be able to control the votes of Panama, Nicaragua and Haiti, and possibly Liberia and Cuba, quite as effectively as the British government controls the votes of India and the dominions.<sup>2</sup> On the whole, it would seem that the criticism directed against the provisions of the Covenant allowing India and the self-governing dominions of Great Britain representation in the assembly, is one of the least serious of all the objections that have been made against the League. The inequality which it produces is more largely theoretical than real and leads to no practical consequences. It is of course true, that the limitation of the membership of the council to a small group of powers does play havoc with the principle of equality, so far as representation in that body is concerned, but it should be remembered that the powers of the council are almost wholly advisory, inquisitorial, and mediatory and usually when they are otherwise the approval of the assembly, in which there is equality of representation, is necessary to their validity. Under these circumstances the domination of the council by the nine powers does not by any means produce the inequality of result which some critics of the League have imagined.

We turn now to a consideration of the objects of the League and the powers which have been conferred on its organs

<sup>1</sup> *New York Times*, Dec. 17, 1920, p. 8; also *World Peace Foundation* pamphlet cited, pp. 145 and 160.

<sup>2</sup> Compare the remarks of Mr. A. Lawrence Lowell, *Joint Debate on the Covenant of Paris*, *W. P. Foundation* pamphlet, Vol. II, No. 2 (April 1909), p. 80. The contention was also put forward in the United States that Great Britain would control the votes of Hedjaz and Persia in the Assembly. See the majority Report of the Committee on Foreign Relations of the U. S. Senate on the ratification of the treaty of Versailles, p. 4.

for the accomplishment of these objects. Its purposes are, as stated in the preamble: (1) the promotion of international co-operation and (2) the achievement of international peace and security. Its powers are multifarious and varied but they may be classified under three general heads: (1) those which relate to the execution of the treaties of peace and of various special treaties which may be said to have been a part of the general contribution of the peace conference; (2) those whose general purpose is the prevention of war; and (3) various miscellaneous powers. Its powers in connection with the execution of the treaties are many, as may be seen from a reading of their stipulations. In fact the treaty of Versailles (aside from the Covenant) refers to the League not less than seventy times<sup>1</sup> and the treaty with Turkey refers to it in some 24 places. It is charged with the duties of a trustee in respect to the government of the Saar basin and Dantzig; it exercises a sort of supervision over the mandatories to which have been assigned the government of the former German colonies and the territories taken from Turkey; it was charged with duties in connection with the holding of plebiscites in territories transferred from Germany and Austria; it decides disputes in regard to the revival of treaties; it approves general conventions relating to the international regime of transit, waterways, ports and railways; it takes measures to insure the observance of treaty stipulations relative to the protection of minority races, etc.

Concerning its powers and duties relative to the prevention of war I have already spoken in another lecture. Its miscellaneous functions, which hardly fall within either of the two abovementioned categories, are too numerous to catalogue here. Its powers embrace those of a trustee, governor, arbiter, judge, mediator, conciliator, supervisor, administrator and in some measure, legislator. They are sometimes ill-defined;

<sup>1</sup> Hicks, *op. cit.*, p. 51.



some of them are entrusted to the League as a whole without reference to any particular organ; others are conferred on the council or the assembly or on both acting concurrently; while still others are conferred on the Secretary General, on the permanent court or on the various commissions, international offices, mixed tribunals or other agencies which are a part of the general League organization. The limits of this lecture do not permit of a discussion of the powers of these various organs. Those of the council are the most numerous and important though they are, for the most part, merely advisory and suggestive, particularly in respect to measures for the prevention of war, its decisions being in the nature of recommendations, reports or proposals for the consideration of the members of the League. This is also true of the powers of the assembly which is, in the main, a conference for debate. President Wilson in presenting the draft to the plenary session of the conference on February 14, 1919, described it as a body with "unlimited rights of discussion"—of anything that falls within the field of international relations. But, with a few exceptions, neither it nor the council has power to make decisions which are binding upon the members of the League. They may discuss, recommend, mediate and propose, but they cannot legislate or execute.<sup>1</sup> And even such action as they are empowered to take, may, with a few exceptions, be reached only by unanimous vote. These limitations of power and procedure reduce the actual authority of the League to very narrow proportions. Its chief possibilities for achievement, therefore, lie in the moral authority and influence which it may be able to exert.

The most valuable feature of the constitution of the League is to be found in the "covenants" which the members undertake and the obligations which they assume. The first of these in importance are those which they have entered into in regard

<sup>1</sup> Compare Hicks, *op. cit.*, p. 371, and Potter, *op. cit.*, pp. 470-471.

to the making of war. They agree not to resort to war until they have first made an effort to settle their controversies by arbitration or mediation. They pledge themselves to submit to arbitration such disputes as they recognize to be suitable for arbitration and to refer all other disputes to inquiry by the council. If a dispute is submitted to arbitration the parties are bound to carry out in good faith the award and to abstain from resorting to war with a member which complies therewith. If the dispute is submitted to inquiry by the council they agree not to go to war with any party to the dispute which complies with the unanimous recommendation of the council. The members further agree that in no case will they go to war until three months after the award has been made by the arbitrators or the report has been made by the council. These are very important "covenants" and if scrupulously performed will go far toward preventing recourse to hostilities in the future. The chief defect of this system lies, as I have pointed out in another lecture,<sup>1</sup> in the purely voluntary character of the obligation regarding arbitration, since the parties to a dispute are not bound to arbitrate any controversy which they do not themselves consider to be suitable for arbitration. Nevertheless, they are bound either to arbitrate or to submit their dispute to inquiry and recommendation by the council. They may refuse to arbitrate, on the ground that they do not recognize the dispute to be one which is suitable for arbitration, but in that case they must submit their case to the council. They cannot escape both alternatives and begin war before having recourse to one or the other means of peaceable settlement.

To enforce observance of these covenants sanctions have been provided, for the authors of the League constitution wisely assumed that there would be states in the future as there have been in the past, who could not always be depended upon to observe voluntarily their international obligations. "Without

<sup>1</sup> Lecture X.

an effective sanction," as General Smuts remarked in the commentary on his plan, "the League would be a pious aspiration or a dead letter." The League therefore had to provide machinery both of coercion and restraint, especially to insure the fulfilment by the members of their covenants in respect to the making of war. Two sanctions are provided (1) a commercial and financial boycott of the covenant breaking member and its nationals, and (2) the employment, in case the former is not effective, of military force against it. The boycott, it may be added, applies not only to trade and intercourse between the covenant-breaking member and the other members of the League but also to that between it and states which are not members of the League. Each member is bound by the terms of the Covenant to apply "immediately" the boycott against any member which in disregard of its covenants resorts to war, such act being declared to be an act of war against all other members of the League. Each member further agrees to "mutually support" the others in the application of the boycott and to allow the military forces of the League to pass through its territory for the purpose of protecting the covenants of the League.<sup>1</sup> The obligation to furnish military forces in case military action should be necessary is less absolute. The Covenant limits itself to saying that in such case the council shall "recommend" to the several governments concerned the forces they shall contribute.<sup>2</sup> The fact that the decision of the council is in the nature of a recommendation would seem to weaken the binding force of the obligation to furnish quotas. It is not clear therefore whether a member which should refuse to contribute its quota of military forces in such a case would thereby be guilty of violating its own covenants or not.<sup>3</sup>

<sup>1</sup> As mentioned above Switzerland has been exempted from this last-mentioned obligation.

<sup>2</sup> Switzerland has likewise been relieved of this obligation.

<sup>3</sup> In 1920 the Spanish government declined to participate in the military measures of the League for the maintenance of order in

Most of the plans for a League of Nations, elaborated during the World War, recognized the necessity of sanctions of some kind or other as an essential feature of an effective international organization.<sup>1</sup> Most of them provided for both economic and military sanctions; <sup>2</sup> the Italian project, in addition, provided for the suspension of treaties with the covenant-breaking member, the imposition of indemnities upon it, the seizure of its property situated in the territories of the other members, refusal to honor its credit, expulsion of its nationals, its exclusion from the family of nations, etc.<sup>3</sup> The French project provided for various sanctions, which it classified under four heads: (a) diplomatic, (b) judicial, (c) economic, and (d) military. The French project also contemplated the establishment of an international armed force under a common command or general staff and this was advocated by the French delegation at the peace conference.<sup>4</sup> This army was to be strictly a League force which could be called out and employed by its authority. Intrinsically, the French project was preferable to the scheme adopted, under which the League is dependent upon the voluntary contributions of the members, which may be promptly furnished, or furnished only after long delay or refused entirely. Logically, the League should have its own armed force and

Lithuania. Several other governments appear to have adopted a similar course. In 1921 the Assembly approved an amendment to the Covenant which makes it clear that it is for the council to give an opinion whether or not a breach of the Covenant has taken place though it rests with each state to make its own final decision in so far as its responsibilities are concerned. *Monthly Summary of the League of Nations*, Oct. 1921, pp. 115, 137.

<sup>1</sup> See the summary by Professor Ogg in Duggan's *The League of Nations*, pp. 114 ff.

<sup>2</sup> See especially General Smuts' plan which laid great emphasis on the matter of sanctions. Text in the *New York Nation*, of February 8, 1919, pp. 225 ff.

<sup>3</sup> Scelle, *Le Pacte de Nations*, p. 320.

<sup>4</sup> *Ibid*, pp. 321 ff.

this it will have if it ever develops into a really effective organization for safeguarding the general peace.<sup>1</sup>

The degree of effectiveness of the economic boycott will depend partly upon the degree to which the members of the League perform their covenants in regard to the application of the boycott measures and partly upon the geographical situation and size of the covenant-breaking state against which it is directed. If the latter is an insular state like the British Isles or Japan or a small continental state like Belgium or Switzerland it would be easy enough to strangle it by means of a boycott rigorously enforced by all the other members of the League. Most states are so dependent to-day upon the outside world for the maintenance of their economic life that they could hardly hold out for an indefinite length of time against economic measures which effectively isolated them. An English writer thus states the case: "If all diplomatic intercourse were withdrawn; if the international postal and telegraphic systems were closed to a public law-breaker; if all inter-state railway trains stopped at his frontiers; if no foreign ships entered his ports, and ships carrying his flag were excluded from every foreign port; if all coaling stations were closed to him; if no acts of sale or purchase were permitted to him in

<sup>1</sup> "President Wilson said that the League of Nations should be the 'eye of the nations to keep watch upon the common interest, an eye that does not slumber, an eye that is everywhere watchful and attentive.' He should have added: 'the League shall also be the combined mighty fist of the nations, ever ready to protect the weak and defenseless nations against injustice and to restrain or punish the most powerful when they are tempted to venture on schemes of lawless conquest.'" Crozier, *The League of Nations*, p. 20. Compare also the remarks of Woolf (*International Government*, p. XV) that "until Europe is provided with a new organ for supernational action, provided with an effective police, all talk of making an end of war is mere waste of breath." Also the opinion of Major Davis of England who advocates the establishment of an international police force under the control of the League. *International Law Association Report*, 1920, p. 100. But the Dutch jurist, de Louter, attacks the idea as impracticable and dangerous. See his article *La Crise du Droit International*, *Rev. Gén* 1919, p. 91.

the outside world—if such a political and commercial boycott were seriously threatened, what country could long stand out against it ?”<sup>1</sup> The effect of the blockade of Germany during the World War showed clearly the possibilities of isolation measures. Had all the states co-operated with Great Britain and France in the measures which they adopted to cut off her sources of supply from the outside world it is almost certain that she could not have kept up the struggle as long as she did. On the other hand, states of large extent and with vast resources, constituting continents in themselves, such as the United States, would naturally be difficult to coerce or restrain either by means of an economic boycott or by any military forces which the League would be likely to have at its command. But the number of such states is not large. In the vast majority of cases it is believed that the employment by the whole body of states of their combined economic power would be fairly effective in bringing a covenant breaking member to terms.

Such are the covenants which the members of the League have entered into in regard to the making of war and the application of measures of restraint or coercion against those who break their covenants. There are others still. The most important of them, perhaps, is that embodied in the much discussed Article X by which the members undertake to respect and preserve against external aggression the territorial integrity and existing political independence of all the members of the League. This undertaking was based on the well known fact that the cause of many, perhaps, the majority of the wars, of the past has been the motive of aggression—the desire to appropriate territory belonging to other states. It was therefore felt that if an effective guarantee against such aggressions in the future could be provided, one of the most frequent motives for wars would be removed. President Wilson spoke of the guarantee which Article X provides as the very “heart”

<sup>1</sup> Hobson, *Towards International Government*, p. 90.

of the Covenant. But it found many critics in the United States and elsewhere and it furnished one of the principal reasons why the Senate of the United States rejected the treaty of Versailles. At the first meeting of the Assembly of the League in September, 1920, a Canadian delegate proposed an amendment eliminating Article X from the Covenant but the committee to which the proposal was referred reported in favor of its retention and its report was approved by the Assembly. "Exclusion of acts of aggression as a means of modifying the territorial integrity and political independence of states is," it declared, "the very essence of the League of Nations." Nevertheless, with a view to overcoming the most important objection to it, the committee undertook to re-define the purport of the article which, it was said, did not undertake to "guarantee" the territorial integrity or political independence of any member but merely "condemned" external aggression. This interpretation seems to be contrary to the plain language of the article and to the intention of its authors and the effect would be to take the "teeth" out of the guarantee. There was and is still a difference of opinion as to the advisability of having inserted the article in the Covenant. But if it merely "condemns" acts of aggression without guaranteeing the members against such acts, as it has been so interpreted by the committee, it is an entirely harmless undertaking and there ought not to be any further objection to it on the score that it involves a dangerous obligation. An obviously just interpretation of the article as made by the committee was, that it did not prevent territorial and political changes through legitimate means, in contradistinction to acts of aggression, and that the members were not legally bound to take part in any military action of the League, since the decisions of the council in such cases are in the nature of recommendations which may or may not be adopted by the governments to which they are addressed.

Among other "covenants" by which the members of the League are bound are : that they will register with the secretariat

every treaty or international engagement hereafter entered into, so that secret treaties will be eliminated from diplomacy ; that they will consider every existing obligation or understanding between themselves which is inconsistent with the terms of the covenant to be abrogated and that they will not in the future enter into such engagements ; that they will endeavor to secure and maintain fair and humane conditions of labor for men, women and children, in their respective territories ; treat justly the native inhabitants of the territories under their control ; entrust the League with the general supervision over the execution of international agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs and the trade in arms and ammunition in so far as such control is necessary in the common interest ; secure and maintain freedom of communications and transit and equitable treatment for the commerce of all members of the League ; and endeavor to take steps in matters of international concern for the prevention and control of disease.

The totality of the "covenants" constitutes a body of international undertakings which both in respect to their number and importance are far in excess of those ever before entered into by the society of states. The assumption of these obligations by so large a number of states constitutes therefore the most important advance ever made in the direction of international co-operation and collective responsibility. Herein lies the chief value of the League of Nations and the measure of success which it attains will depend upon the degree to which these obligations are faithfully and scrupulously performed by the members which have assumed them. It is regrettable that the obligations thus assumed were not more thorough-going, especially in regard to the peaceable settlement of international differences. As pointed out above, the obligation to arbitrate extends only to such disputes as the parties may choose to recognize as suitable for arbitration, which means, in the last analysis, no real obligation to arbitrate any dispute



at all. So in regard to the obligation to have recourse to the permanent court of international justice, it is entirely voluntary and the members are free to carry their cases to it or not, without violating the covenant. Herein lies the chief weakness of the machinery and processes created by the League for the peaceable settlement of international differences. They fall far short of the point to which the world must go before the greatest object of the League—the “achievement of international peace and security”—can be realized.

Finally, a very serious weakness of the League is to be found in the lack of adequate power attributed to its organs. As already remarked, its principal organs, the council and the assembly, have neither legislative nor executive power in any effective sense of the term. They may debate, exchange opinions, investigate, mediate, advise, recommend and propose but they have little power to bind the members of the League by their decisions. In the last analysis, everything depends upon their own good will and spirit of co-operation. The rule of unanimity in respect to all important decisions which leaves each state the fatal right of the *liberum veto* very nearly reduces the League to the state of impotency and paralysis.<sup>1</sup> Nevertheless, while the League organs are lamentably lacking in real authority, the League is capable of exerting very great moral authority and influence and herein lies one of its chief possibilities for good. In proportion as it employs this authority in a way to inspire public confidence, in that proportion will it accomplish the ends for which the League was created. At least this much may be said of it: its establishment constitutes a distinct advance upon all former attempts at international co-operation and organization. No one pretends that it even approximates the ideal organization; it is admittedly

<sup>1</sup> Some of these and other defects in the organization of the League are pointed out by Mr. F. N. Keen in an article entitled “Revision of the League of Nations Covenant,” *V Grotius Society Transactions*, pp. 95 ff.

far from perfect; like many other international undertakings of the past it is rudimentary in organization and rests mainly on moral authority. But it represents a beginning, a very promising beginning—and we must trust to time and circumstance to develop and perfect it. It may be compared to the political confederations of the past—all of which were largely impotent yet all of which rendered distinct service and ultimately developed into more perfect organizations. Like these confederations, it may be said of the League of Nations that it represents a transitory stage in the evolution of the world from a congeries of isolated communities to an organized society of states. This is a necessary process through which the world must pass in order to attain an effective organization. Those who criticise the League because it does not already represent this ultimate and final stage of perfection are blind to one of the most obvious laws of political evolution.

In creating the League of Nations its founders encountered three obstacles which have always stood in the way of organization of the world. They are: (1) the disinclination of states to assume international obligations and responsibilities in the common interest; (2) their unwillingness to surrender any portion of their own freedom of action, such as would involve a limitation on what is popularly regarded as their sovereignty; and (3) their refusal to participate in any common organization which is not based upon recognition of the absolute equality of all states, great and petty alike. It was largely for the first two reasons that the United States refused to become a member of the League. The obligations created by Article X, in particular, were denounced as going beyond what states could safely assume. On the other hand, the Covenant has been criticized by men like Mr. Root because the obligations which it created in respect to arbitration and judicial settlement are not sufficiently thorough-going to constitute any real progress over existing methods. I venture to repeat also my own opinion that the unwillingness of states to assume larger obligations,

especially of the latter character, has greatly impaired the potentialities of the League as an agency for the maintenance of the general peace. The fact is, no association of states designed to achieve international peace and security, which does not require of its members the assumption of important obligations and responsibilities in the common interest, can ever be little more than a pious aspiration. The same observation may be made in regard to the indisposition of states to relinquish a portion of their own liberty of action and to entrust to a common organization certain powers of control and supervision in the interest of all. The state itself could never have been organized on any other principle and it is not to be assumed that an effective association of states can be formed on any other principle. During the long debate in the Senate of the United States on the treaty of Versailles the assertion was made again and again by Senators that they were in favor of a League of Nations provided it did not involve a diminution of the sovereignty of the United States. If the sovereignty of a state is to be interpreted as meaning absolute and unlimited freedom of action in its external relations, then obviously no league or association of states can be formed, which does not impair, in some measure, their sovereignty. The truth is, those who oppose any international organization which limits the sovereignty of states have a misconception of the real character of sovereignty. The sovereignty of a state in any true and reasonable sense of the term means nothing more than its full power of control over all persons and things subject to its jurisdiction. To say that it includes absolute and unlimited freedom of action in respect to other states is to pervert and distort the true conception. In short, sovereignty is an internal and not an external power ; it does not embrace the power to command beyond its own boundaries. The old idea that it is an absolute power unlimited by the rights of other states—that it includes the right to make war upon other states with or without

just cause, take their territory and acquire legal title to it by no other right than force, to judge its own controversies, set up its own standards of international conduct and to pursue whatever policies it pleases without regard to the rights and interests of the whole body of states—in a word, that states are bound by no law except their own—is a “malign and sinister inheritance” of the middle ages and should be discarded.<sup>1</sup> Even the internal sovereignty of states is in some measure limited by their obligations and responsibilities toward other states. This would not be true if states lived to-day in absolute isolation and maintained no relations with other states so that no state would have any concern with what happened beyond its own boundaries, but such is far from being the actual situation. The body of states to-day constitute collectively an international community or society bound together by a vast network of relationships resting upon a solidarity of interests which know no boundary lines. In such a society the absolute sovereignty of a particular state in its relations with other states is as unthinkable as that of the individual in his own community. The sovereignty of each is limited by the system of international law which is admitted to be a part of the municipal law of every state which has been received into the family of nations and it is also expressly limited by many international conventions multi-lateral and bi-lateral, every one of which abridges in some way the freedom of action of the parties. Every step of progress toward international co-operation and the development of a real society of states has in fact come through the acceptance of obligations, the assumption of responsibilities and the relinquishment by states of a portion of their freedom of action in the common interest, and it may be added that whatever progress along this line is achieved in the future

<sup>1</sup> Compare in this connection the observations of Mr. David J. Hill in his *The Rebuilding of Europe*, especially Ch. I.

must come through the same process.<sup>1</sup> The fact is, the sacrosanct conception of absolute sovereignty which has so long stood in the way of international organization and co-operation is a survival of a mediæval theory which was justifiable enough under the conditions of the age in which it originated but which is as much out of place in the present age as anarchy itself. It is totally discredited by the facts of international life and should be definitely consigned by jurists to the category of other discarded and outworn political theories of the past. If this were done, the task of reorganizing the society of states and of facilitating the achievement of great objects which all men cherish would be immensely lightened.<sup>2</sup>

<sup>1</sup> Compare the following remarks of the late Senator P. C. Knox in his addresses on "International Unity" before the Pennsylvania Society of New York, in December, 1909: "Every material and moral advance in the solidarity of nations, for universal, as distinguished from local or domestic purposes, is achieved by concessions, restraining to a greater or less degree the liberty of action of individual states for the benefit of the community of nations and in obedience to the demands of an international public opinion." Also the following from Viscount Grey's address of May 11, 1918 on the League of Nations: "The second condition essential to the foundation and maintenance of a League of Nations is that the governments and peoples of the states willing to found it must understand clearly that it will impose some limitation upon the national action of each, and may entail some inconvenient obligation."

<sup>2</sup> To this effect, see Dupuis, *Le Droit des Gens et les Rapports des Grandes Puissances avec les Autres États* (1921), especially Chs. III and XIII; Potter, *Introduction to the Study of International Organization* (1922), p. 381; David J. Hill, *The Rebuilding of Europe*, (1917), especially Ch. I; also the same author's *World Organization and the Modern State* (1911), pp. 127-129; Wehberg, *The Problem of an International Court of Justice* (1918) pp. 1-6; Rogers in Duggan's *League of Nations*, (1919), p. 90; Sayre, *ibid.*, pp. 158 ff.; Scelle, *Le Pacte des Nations* (1919), pp. 92 ff.; Pillet in 5 *Rev. Gén.* p. 80; Vollenhoven, *The Three Stages in the Evolution of the Law of Nations* (1919); Dickinson, *Equality of States* (1921), see index; Brown, *International Realities* (1917), p. 66; Hicks *The New World Order*, (1920) especially pp. 8 and 16. The Dutch jurist, de Louter, in an article entitled *L'Avenir du Droit International* (19 *Rev. Gén.* pp. 293 ff.) protests against the theory of "internationalism" which would erect over states an organization which would destroy their sovereignty yet he admits in a later article (*La Crise du Droit International*, 26 *ibid.*, p. 88), that

The third obstacle which has stood in the way of the organization of the society of states is the equally sacrosanct theory of the absolute equality of states. It has been a retarding element in every international conference, it wrecked the project of the second Hague conference for the establishment of an international court of arbitral justice and it was responsible for the unanimity rule and the *liberum veto* in the Covenant of the League of Nations. The theory was not, as is often asserted, a part of the Grotian system. It was the invention of his "naturalist" successors who undertook to apply to states the theories of natural law, one of which was the doctrine that all men are equal.<sup>1</sup> The doctrine thus deduced was not simply a theory of equality before the law but equality in all respects: equality of rights, equality of capacity, of representation and of voice in international conferences. This principle of perfect and absolute equality became the doctrine of publicists and of national courts and it found recognition in the rules of procedure of international conferences which allowed each state one vote and generally required unanimity of decision as an essential condition to the validity of decisions taken. It was never much more than a theory, however, and has been so consistently disregarded by the European Concert from 1815 to the present time that writers are not lacking who maintain that it has lost its sanctity. Lawrence even contends that the great powers have acquired from long and frequent usage what is hardly distinguishable from a *legal right* to settle questions of general European concern as they please and to require the smaller states to acquiesce in their decisions. He concludes that in the face of these facts it is impossible to hold any longer to the old doctrine of the absolute equality of all independent states before the law. And he adds: "it is dead and we ought

the "false conception of sovereignty and the narrow spirit of those who exercise it," is to be condemned.

<sup>1</sup> Compare Dickinson, *Equality of States*, Ch. II; also his article in 12 *Amer. Pol. Sci. Review*, especially, p. 307.

to put in its place the new doctrine that the great powers have by modern international law a primacy among their fellows, which bids fair to develop into a central authority for the settlement of all disputes between the states of Europe."<sup>1</sup> Other recent publicists like Oppenheim have gone almost to the same length of recognizing the actual if not the *legal* primacy of the great powers and of repudiating the doctrine of absolute equality. They point out, what is obvious, that in fact states are not equal in area, population, resources, influence or capacity and they cannot be made so by declarations or resolutions. "The great powers," says Oppenheim, "are the leaders of the family of nations and every progress of the law of nations during the past is the result of their primacy."<sup>2</sup> Other writers have pointed out that since international law is based largely upon practice, and since the view of Lawrence is certainly supported by long usage and acquiescence, it may be said to be an established principle of international law.<sup>3</sup>

<sup>1</sup> *Essays on Some Disputed Questions of International Law*, (1885) p. 226.

<sup>2</sup> *International Law* (first edition, 1905) Vol. I, pp. 162 ff. Elsewhere, however, Oppenheim appears to adopt a somewhat different view. In his *Future of International Law* (1911) he recognizes that the equality of states "is the indispensable foundation of international society." He interprets this equality to mean merely that "in all resolutions of the international society every state, whatever may be its size and political importance, obtains one voice and no more than one, that every state can be bound by a resolution only with its consent and that no state can exercise jurisdiction over another state. It does not and cannot express more. In no circumstances, is it to be asserted that unanimity is a condition for all resolutions of the conferences and that all resolutions are void to which one or more states refuse their consent." (English trans. p. 20).

<sup>3</sup> Compare Hicks in 2 *Amer. Jour.*, p. 549. Taylor also adopts the view of Lawrence, *Int. Pub. Law.*, Sec. 69. Compare also the remarks of Professor Quincy Wright (13 *Amer. Pol. Sci. Review*, p. 561) that "equality before the law does not imply equality in political weight or administrative authority," and he adds that, on the contrary, where each state supplies its own remedy, equality before the law is jeopardized, that to attain equality of remedy, organization is necessary and that effective organization implies distinctions in administrative authority and, under present conditions, of political power.

Whatever may be the correct legal view as to the primacy of the great powers, that primacy exists as a political fact and has been so often asserted with success and so often acquiesced in, that it would be useless to deny its existence. Certainly it is difficult to defend the theory of the absolute equality of states in the form in which it has often been stated by jurists and publicists, particularly of small states.<sup>1</sup> That all states are equal before the law, that is, that all are entitled to the equal protection of the law, that they are all entitled to have their independence and sovereignty respected, so long as they respect the right of other states, and that they have a right to participate in the deliberations of international conferences which are concerned with affairs of general interest, is admitted by all.<sup>2</sup> On the other hand, the claim that a petty state like Hedjaz, Georgia, Haiti, San Domingo, Costa Rica, and numerous others, shall have an equal voice with the great powers, in such deliberations, that their consent shall be necessary to the validity of every decision taken, in brief, that they shall be entitled not only to equality of legal protection, dignity and respect but also to equality of voice and power in all international councils, is a claim which if admitted would not only lead to obvious injustice but would prevent all effective international organization. To take a particular case for illustration, upon what consideration

<sup>1</sup> For example, by Barbosa, the Brazilian delegate to the Second Hague Conference and even by M. Bourgeois at the same conference who declared that "there are here neither large nor small powers; all are equal before the work to be accomplished." Quoted by Hull, *op. cit.*, p. 309.

<sup>2</sup> Professor Brown concludes that "there does not exist a 'perfect equality of nations': that all have not equal power and influence; that they do not participate equally either in the creation or the administration of law; but that they are nevertheless entitled to what Bonfilis has termed 'respect for political personality.'" See his article in 9 *Amer. Jour. of Int. Law*, p. 329. Compare also Dupuis, *Le Droit des Gens, etc.* (1921), Ch. I, and Westlake, *Collected Papers on International Law*, p. 93, who remarks that "at no time in no quarter of the globe can small states ever have been admitted by large ones to political equality with themselves."



of justice or public policy could the claim of a petty land-locked state to have an equal voice with the United States or Great Britain in the determination of the rules of maritime law or the constitution of an international prize court, be defended? Can it be admitted that any principle of substantive justice or sound public policy gives such a state, or even a small group of such states, the right to veto the decisions of the majority or even those of the maritime powers in regard to such questions? We think not. Any such theory of equality is contradicted by all the facts of international life and the theory should be so modified as to bring it into conformity with these facts. The sooner it is done the easier the task of international organization will become. It ought to be possible to devise some system of grading or classifying states so that their voices and share of participation in international councils may be weighted according to their importance.<sup>1</sup> Such a grouping and weighting of states on the basis of their real importance and influence would not be inconsistent with the principle of equality before the law or with the right of representation or participation in international councils. Various factors might be taken into consideration as the basis of this classification: the quantitative factor of area, wealth and population; the qualitative factor of civilization; and the capacity for discharging international responsibilities.<sup>2</sup> What is needed, as has been aptly remarked by a careful student of the subject, is "a theory of national representation in international bodies which will rest on facts and

<sup>1</sup> Compare the suggestions to this effect of Lorimer in his *Institutes of the Law of Nations*, Vol. I, p. 182, the scheme of Duplessix in his *La Loi des Nations*, pp. 27-28; the observations of Hicks in 2 *Amer. Jour.*, p. 552 ff.; and Huber's defense of a system of gradation of states in his *Gleichheit der Staaten*, p. 116. See also Schückung, *op. cit.*, pp. 230 and 271, who thinks it not unjust that in international organizations the legal influence of states should be graded according to their actual importance.

<sup>2</sup> Compare in this connection Dickinson in 12 *Amer. Pol. Sci. Review*, pp. 308-311.

not upon an outworn metaphysics of public corporations.”<sup>1</sup> Professor Dickinson, who has contributed the most valuable study to the subject that has been made by any writer, concludes that “the problem of international organization should not be confused and complicated by attempting to insist upon the application of the principle of state equality—it is inapplicable from its very nature to rules of organization. Insistence upon complete political equality in the constitution and functioning of an international union, tribunal or concert is simply another way of denying the possibility of effective international organization.” And he adds: “renewed interest in world organization in the twentieth century has brought with it a widespread conviction that the principle of equality, as hitherto understood, is irreconcilable with the development of adequate supernational institutions, and that the principle must be limited in the interest of a better international order.”<sup>2</sup>

<sup>1</sup> Potter, *Introduction to the Study of International Organization*, pp. 252, 332. Compare also Myers in 8 *American Journal*, pp. 81 ff.

<sup>2</sup> *The Equality of States*, pp. 144, 336. Compare also Woolf (*Int. Government*, p. 120), who justly remarks that “if the world is ever to organize itself for the peaceful regulation of international affairs that organization must provide for the essential inequality of states. If such inequality is not reflected in the pacific machinery, it will be left to rust unused.” See also Schückung, *The International Union of the Hague Conferences*, pp. 209 ff., who remarks that from the time states began to come into the Hague organization the principle of a unanimous vote began to weaken as a practical rule. At the first conference the principle of unanimity was preserved only for the important conventions and at the second conference it was agreed that resolutions in which there was a “quasi-unanimity” should be regarded as resolutions of the conference. Compare also the project of new bases of international law submitted to the American Institute of International Law in 1917, Art. 9 of which declares that in international conferences the rules recognized as fundamental and adopted by a majority should bind the minority. *Acte Finale de la Session de la Havana*, p. 71.

## LECTURE XIII

### Development of the International Court of Justice

The establishment of a permanent international court primarily for the settlement of disputes among states and secondarily as an agency for the development of international law has long been a dream of publicists and international jurists. It has now been, in part at least, realized and it constitutes one of the outstanding achievements in the history of the recent development of international law.

The idea of a world court is as old as international law itself but the efforts which have resulted in the fruition of the idea hardly antedate the present century. More than six hundred years ago (1305) a Frenchman, Pierre Dubois, suggested a tribunal which bore a striking resemblance to that created by the Hague Conference in 1899.<sup>1</sup> The "Great Design" of Henry IV of France (1603), one of the earliest projects for the maintenance of perpetual peace, contemplated a general European Council which was to be charged, among other things, with the task of adjusting disputes between the fifteen States composing the League which he proposed. In form, it was not to be strictly speaking, a judicial tribunal but a sort of senate of about seventy members, though it was to exercise judicial functions.<sup>2</sup> In 1623 another Frenchman, Eméric Crucé published a small book entitled *Le Nouveau Cyndé* in which he proposed a universal Union of States with an organization, one feature of which was to be a permanent assembly composed of representatives of all the states, charged with settling

<sup>1</sup> See Vesnitch, *Deux Précurseurs Français en Pacifisme* (1911), p. 29.

<sup>2</sup> The Great Design is generally admitted to have been the conception of Henry IV's minister, Sully. See Nys, *Études de Droit Int.*, p.

controversies which might arise between two or more of them.<sup>1</sup> Crucé's scheme was probably the first proposal to substitute international arbitration for war, as a court of last resort for Nations.<sup>2</sup> In 1693-94 William Penn in his "Essay Towards the Present and Future Peace of Europe" proposed a plan for the establishment of an international parliament or assembly which was to exercise judicial as well as deliberative functions. Before this assembly was to be brought all disputes between states, which could not be settled through diplomatic means. In case any particular sovereignty should refuse to submit its claims or pretensions to this body, or which having done so, should refuse to accept its judgment, the others should unite their forces and compel it to submit.<sup>3</sup>

In the early part of the eighteenth century the Abbé Saint-Pierre elaborated his famous project of perpetual peace in which he proposed a permanent union among the Christian States of Europe, one of the organs of which was to be a senate charged with the duty of attempting to reconcile differences between the members and in case of failure, to "judge them by arbitral judgment." The sovereign who should refuse to accept a judgment of the senate pronounced against him should be declared an enemy of society and it should make war upon him at his expense and compel him to abide by the decision.<sup>4</sup>

302. The French text of the Great Design with an English translation, from Sully's Memoirs (Vol. 6, pp. 129 ff.), may be found in Darby's *International Tribunals*, pp. 10-15. See also Kamarowsky, *Le Tribunal International*, p. 249. Much information may be found in these two works regarding the proposals that have been made from time to time for the establishment of an international court. Some of the later projects are discussed by Wehberg in his *Problem of an International Court of Justice*, ch. VII.

<sup>1</sup> Darby, *op. cit.*, pp. 22 ff., and Kamarowsky, p. 250.

<sup>2</sup> T. W. Balch, *Le Nouveau Cynée*.

<sup>3</sup> Details of the plan in Darby, pp. 56 ff. Sir Frederick Pollock (*The League of Nations*, p. 5) remarks that Penn "appears to have been the first writer who attacked the problem with much practical sense of its conditions."

<sup>4</sup> Text of the project in Darby, pp. 70 ff. See also Kamarowsky, p. 250.

Rousseau wrote a memoir on the Abbé Saint Pierre's project and while he did not approve it in its entirety he declared that the ideas upon which it was based were sublime, useful and in harmony with the true interests of states.<sup>1</sup>

Toward the end of the eighteenth century Bentham wrote several essays dealing with international law in one of which, entitled "a plan for an universal and perpetual peace," he advocated as means to this end the codification of international law and the establishment of "a common court of judicature for the decision of differences between the several nations." With the establishment of a common tribunal, he argued, the necessity for war would no longer exist because war results from differences of opinion which the parties are unable to settle. "Just or unjust, the decision of the arbiters will save the credit, and the honour of the contending parties."<sup>2</sup> About the same time Kant published his "Essay on Perpetual Peace,"<sup>3</sup> in which he maintained that the reign of perpetual peace was not a chimera but could be gradually realized through the creation of a union of states. Such a union he proposed, with a permanent congress to which, as an arbiter, complaints and differences might be brought for adjustment.

During the nineteenth century projects for the establishment of international judicial or arbitral organs of one kind or another, for the settlement of differences between states greatly multiplied. Bluntschli in 1867 advocated the submission of disputes to an arbitral tribunal, although it does not appear that his project contemplated the establishment of a permanent tribunal.<sup>4</sup> He did, however, recommend the creation of certain international administrative and legislative organs. A little later the Scotch jurist Lorimer advocated the establishment of

<sup>1</sup> Text in Darby, 105 ff.; Comment in Kamarowsky, p. 251.

<sup>2</sup> Bentham's Works (Bowring's ed.), Vol. II, pp. 546 ff.

<sup>3</sup> *Zum Ewigen Friede* (1795). Outline of Kant's project in Darby, 158 ff.

<sup>4</sup> Text of his project in Darby, pp. 188 ff.

an international court of 14 judges appointed for life, six of whom should be representatives of the six great powers. The court was to have jurisdiction of all questions of public international law, involving pecuniary or territorial claims, and the like, in so far as their solution depended on the construction of treaties. He also suggested provision for an international armed force for the enforcement of the decisions of the court and the enactments of the international legislature which his scheme contemplated.<sup>1</sup> In 1872 the American jurist, David Dudley Field, in his *Outlines of an International Code* proposed the creation of a Joint High Commission to be charged with the task of endeavoring to reconcile differences which might arise between states. In case of failure the differences were to be submitted to a High Tribunal of Arbitration. His project did not, however, contemplate that either body should be permanent but each was to be appointed by the parties whenever a dispute which could not be settled by diplomacy should arise.<sup>2</sup> In the same year Senator Sumner introduced in the United States Senate a resolution proposing the establishment of an international tribunal clothed with such authority as to make it a "complete substitute for war." About the same time Laurent, Fiore<sup>3</sup> and Bergbohm<sup>4</sup> recommended the codification of international law and the creation of an international tribunal. During the ensuing years the creation of an international court was advocated by J. S. Mill, Leone Levi, Sir Edmund Hornby, Seebohm, Dupasquier, Maurice Adler, M. Bara, M. Goblet d'Alviella, Elihu Burrit, Ladd, Lavelaye, and others.<sup>5</sup> In the meantime, various scientific and professional bodies were active

<sup>1</sup> *Institutes of the Law of Nations*, Vol. II, pp. 284-287.

<sup>2</sup> See articles 532-536 of his *Outlines*.

<sup>3</sup> *Sul Problema Internazionale della Societa Guiridica degli Stati*, 1878.

<sup>4</sup> *Staats Verträge und Gesetze als Quellen des Völkerrechts*, 1877.

<sup>5</sup> Their projects are explained either in Darby's or Kamarowsky's works. Others are referred to in Wehberg, *The Problem of an International Court of Justice*, Ch. VII.

in recommending and promoting the movement for the establishment of a court. In 1877 the Institute of International Law adopted a plan for the organisation of an international prize court which was to replace the existing system of national prize courts.<sup>1</sup> In 1893 a project for the organization of a permanent international tribunal of arbitration composed of seven members was presented to the Universal Peace Congress at Chicago. The tribunal was to be created by a general treaty and the expenses of arbitration proceedings, including the compensation of the arbitrators, were to be paid in equal portions by the nations which were parties to the treaty. In case any party to the treaty should begin hostilities against another party before exhausting the means of reconciliation provided in the treaty or which should fail to comply with a decision, the chief executive of every other party should issue a proclamation declaring such act or failure to be an infraction of the treaty, whereupon the ports of such nation should be closed to all vessels of the offending nation.<sup>2</sup> This and other projects were considered at subsequent meetings of the Congress and at the Hamburg meeting of 1897 a resolution was adopted favoring the creation of such a tribunal.<sup>3</sup> In 1895 the inter-parliamentary union at its meeting at Brussels urged the creation of a permanent court of international arbitration consisting of two members appointed by each signatory power for a term of five years.<sup>4</sup> In the following year the Bar Association of the State of New York addressed a petition to the President of the United States requesting him to enter into negotiations looking toward the conclusion of a treaty for the establishment of a Permanent International Court of Arbitration to be composed of nine members appointed for life. To the proposed court, controverted questions arising between any two or more independent

<sup>1</sup> Text in II *Annuaire de l'Institut*, pp. 113 ff.

<sup>2</sup> Text in Darby, pp. 500 ff.

<sup>3</sup> Wehberg, p. 137.

<sup>4</sup> Text of project in Darby, pp. 514 ff. See also Wehberg, p. 138.

powers might be submitted at the option of the disputants. It was in fulfilment of the destiny of the United States, it was declared, that it should take the initiative toward the establishment of permanent peace among the nations.<sup>1</sup>

In 1899 the International Law Association at its Buffalo meeting adopted a project for the creation of a permanent High Court of International Arbitration to which the parties in controversy were bound to submit "all disputes, whatever be their nature or cause, which may arise between them, when such cannot be adjusted in a friendly way by the ordinary course of diplomacy."<sup>2</sup> Finally, it may be remarked that the Lake Mohonk Conference at its meetings from 1895 on, advocated the establishment of a permanent Court of Arbitration and urged the President of the United States to take the initiative in bringing about the creation of such a tribunal.

Such were some of the more important schemes and projects for the establishment of an international tribunal or Council that were elaborated by individuals or groups prior to the opening of the twentieth century. There were of course many others. Some of them did not contemplate the organization of a permanent tribunal supported by the nations in common and always in existence and readily accessible to the parties but provided that it should be organized by the parties *ad hoc* whenever a controversy arose. In some cases, the organ proposed was not to be a court but a diplomatic or political assembly which was to be charged with other than judicial functions and which by reason of its character would not have been well adapted for judicial functions. Finally, most of the projects referred to contemplated the establishment of an arbitral tribunal rather than a court of justice in the strict sense of the word. A considerable number of them were parts of

<sup>1</sup> Text in Darby, pp. 508 ff.

<sup>2</sup> Text, *ibid*, pp. 592 ff.



utopian schemes for the organization of the world and for this reason were never seriously considered by jurists or the general public.

By the beginning of the twentieth century, the desirability of a permanent tribunal for the settlement of certain classes of controversies had come to be generally recognized, sentiment in favor of establishing such a tribunal had become thoroughly crystallized, the increasing solidarity of international interests made it a logical and necessary undertaking and the results of profound study of the details of organization by jurists, learned societies, and legal bodies had simplified to some extent the task of organizing it.

But the practical difficulties of organizing the court through the processes of diplomatic negotiation were almost insuperable. If it was to be created it must therefore be done through the agency of an international conference. The calling of the first Hague Peace Conference in 1899 opened the way and provided the opportunity. The Russian program, while emphasizing the desirability of more frequent resort to arbitration as a means of preventing conflicts between nations, made no specific reference either to the establishment of a permanent judicial court or a tribunal of arbitration. Mr. Hay, Secretary of State of the United States, in his instructions to the American delegation, after adverting to the "continued and wide-spread interest among the people of the United States in the establishment of an international court,"<sup>1</sup> requested them to propose a plan for an "international tribunal" and to use their influence in the most effective manner possible to procure its adoption. His instructions were accompanied by the draft of a project for the organization of a permanent tribunal of judges to be chosen on account of their personal integrity and learning in international law, one from each

<sup>1</sup> Accompanying the instructions was a historical *résumé* furnishing the evidence in support of this statement.

sovereign state participating in the treaty. To this tribunal, the general expense of which was to be borne by the nations in common, the disputing parties were to agree to submit all questions of disagreement between themselves excepting such as might relate to or involve their political independence or territorial integrity. In due course, the American plan was presented to the Conference and it was followed by projects submitted by the British and Russian delegations. By mutual agreement the British plan was made the basis of the deliberations of the conference.<sup>1</sup> The only serious opposition to the proposal for an international tribunal came from the German delegation, whose first delegate, Professor Zorn, attacked the whole idea as an innovation to which his country could never consent. It would, he argued, involve too many risks and dangers; it would therefore be wise to wait until the value of arbitration had been more fully demonstrated. In the meantime, Professor Zorn went to Berlin and laid the whole matter before the foreign office; when he returned he announced that the German government was willing to waive its objection with the understanding that the attempt to confer on the court obligatory jurisdiction in certain cases would be abandoned.<sup>2</sup> This opposition removed, an agreement was reached regarding the organization, competence, and procedure of the Court.<sup>3</sup>

The tribunal thus created, was styled a permanent court of arbitration. It was given competence in all cases of arbitration

<sup>1</sup> Choate, *The Two Hague Peace Conferences*, p. 35. Mr. Choate generously accorded to Lord Pauncefoot the honor of having introduced the plan for the establishment of the court.

<sup>2</sup> Choate, *op. cit.*, p. 36.

<sup>3</sup> For a discussion of the various plans see Holls, *The Peace Conference at the Hague*, pp. 231 ff., and Hull, *The Two Hague Conferences*, pp. 370 ff. See also an illuminating article by Mr. D. P. Myers entitled "The Origin of the Hague Arbitral Courts," in 8 *Amer. Journal of Int. Law*, pp. 769 ff. A good characterization of the Court as finally provided for may be found in the report of the American delegation to the Secretary of State.

unless there was an agreement between the parties for the establishment of a special tribunal, and it was to have its permanent seat at the Hague. It was to be composed of judges appointed for a term of six years by the signatory powers, each of which was authorized to designate not more than four persons "of recognized competence in questions of international law, enjoying the highest moral reputation, and willing to accept the duties of arbitrators." From this body each disputing state was, whenever occasion arose, to choose two arbitrators and these latter were to choose an umpire and the five thus selected were to constitute the arbitral tribunal for the decision of the particular controversy submitted to it. The parties were to conclude in advance of each case a special agreement (*compromis*) clearly defining the object of the dispute as well as the extent of the powers of the arbitrators. It was further added that this agreement to arbitrate implied an engagement of the parties to submit in good faith to the arbitral decision. A permanent administrative council composed of the diplomatic representatives of the signatory powers accredited to the Hague was provided for and also an international bureau to be located at the Hague, which was to serve as the record office for the court, the custodian of its archives and the medium of all communications relating to it. The court was formally opened on April 9, 1901, and it has decided seventeen cases of varying importance submitted to it and several others are now pending. Its creation represented a distinct advance in the development of arbitration by providing a list of judges from which arbitrators could be selected and its value has been demonstrated by the service which it has rendered in settling the controversies submitted to it. But it fell far short of the American and English ideal of a permanent court of international justice.<sup>1</sup> In the first

<sup>1</sup> Compare the Report of the American delegation to the Secretary of State.

place, it was not a permanent tribunal except in name, because it had to be organized and brought into existence by the parties every time they wished to resort to it. And this required the conclusion in advance of a special agreement defining the dispute and the powers of the arbitrators. Furthermore, when the court thus constituted rendered its decision in the particular case submitted to it, it automatically went out of existence. Other parties which desired to have recourse to it were obliged to go through the same procedure of constituting a court and of agreeing upon the issues to be arbitrated and the powers of the arbitrators. In short, the court was, as Martens described it, "but an idea which occasionally assumes shape and then again disappears." Aside from the long delays that were necessarily involved in organizing a court whenever states in controversy desired to have recourse to it, the expense involved in calling it into existence and obtaining a decision was so considerable that governments were reluctant to resort to it, especially when the amount in issue was small. Cases were not lacking in which governments refused to have recourse to it for this reason, although important questions of international law were sometimes involved and a decision would have been desirable in the interest of international jurisprudence. In a number of instances arbitration treaties were concluded, which, instead of conferring jurisdiction on the court, provided for a cheaper and more expeditious mode of arbitration.<sup>1</sup> The expense and the delays involved were, no doubt, one of the reasons why the Hague Court has not been more frequently resorted to since its creation. Moreover, the decisions of one arbitral tribunal were not binding upon others even though the principle of law involved was of universal applicability, and they could not even be invoked as precedents for the guidance of succeeding tribunals.<sup>2</sup> It was impossible,

<sup>1</sup> Wehberg, p. 52.

<sup>2</sup> Compare Scott in 6 *Amer. Jour.*, 336.

therefore, for the so-called permanent court to develop a body of international jurisprudence after the manner of municipal courts in America and England. In consequence, although it has decided seventeen cases since its establishment, it has in fact contributed little or nothing to the development of international law. On the contrary it has, in the opinion of some writers, repudiated some of the most important principles of international law.<sup>1</sup> The Court was defective not only because of its lack of permanency, in consequence of which it was not capable of developing a continuous body of international jurisprudence but because it was not in fact a court of justice but a tribunal of arbitration.<sup>2</sup> A court of justice is composed of judges learned in the law and they render their decisions in accordance with fixed legal rules and principles. A court of arbitration, on the other hand, is not necessarily composed of judges; it may be, and frequently is, composed of diplomats and political men without judicial experience, training, or habits of thought and their decisions are frequently based on equity and other considerations rather than upon strict rules of law. "The arbitrator," says a German jurist, "desires to settle the dispute and satisfy the parties through a decision that will ensure peace." He decides the matter not according to law but disposes of it *ex aequo et bono*.<sup>3</sup>

<sup>1</sup> See the illuminating discussion and criticism in Wehberg, *op. cit.*, pp. 29 ff. Lepradelle and Politis in their *Recueil des Arbitrages Internationaux*, pp. xlv ff. are of the opinion that arbitration has done little for the development of international law. The history of arbitration from 1798 to 1855 (the period covered by their work) shows, they say, that the arbitrations oscillated between compromise and mediation. Some jurists criticised the Hague Court for refusing in the *Pious Fund Case* to recognize the doctrine of prescription in international law. See Wehberg, *op. cit.*, p. 30. The award in the *Savarkar* case was attacked on similar grounds, e.g., by van Hamel in the *Rev. de Droit Int.*, Vol. 13, p. 370.

<sup>2</sup> Compare the observations of Wambaugh (*Amer. Soc. for the Settlement of Judicial Disputes* (pp. 139 ff.) to the effect that arbitration tribunals are not suited to the development of international law.

<sup>3</sup> Pohl, *Deutsche Preisengerichtbarkeit*, p. 208. Compare also Fried in his *Handbuch der Friedens bewegung* (1911), Vol. I, p. 195, who

Albert Gallatin, speaking of the award of the King of the Netherlands in the North-eastern boundary dispute between the U.S. and Great Britain remarked that "an arbitrator, whether he be king or farmer, rarely decides on strict principles of law; he always has a bias to try if possible to split the difference." Wehberg, adverting to the distinction between arbitration and judicial settlement in international law, observes that "the parties desire from the arbitrator a decision satisfactory to both sides, not one based upon the greater right, since their object is to dispose of the dispute. In consequence, they attach no importance to the point that the judges be jurists in the highest sense of the word, but choose any person at all in whom they have confidence. On the contrary, in judicial settlement, there must be a permanent tribunal with permanent judges, because only such an institution can guarantee a decision according to strict law."<sup>1</sup>

The founders of the Hague court of arbitration appear, however, to have intended that it should in some measure be a court of justice as well as a court of arbitration. The Convention of 1899 (Art. 16) declared that "in questions of a legal nature, and primarily in questions regarding the interpretation or application of international conventions, arbitration is recognized by the signatory powers as the most effective and at the same time the most equitable means of settling controversies which have not been settled through diplomatic channels." The Convention (Art. 15) in defining the purpose of arbitration declared that it had for its object "the settlement of disputes between states by judges of their own choice and *on the basis of respect for law*." It is clear that the conference considered

declares that an arbitrator is not a true judge but merely a diplomat and that since he is bound by no law he is in a position to settle a dispute by diplomatic agreement, whereas a municipal judge will always decide according to law only. See also to the same effect Oppenheim, *The Future of International Law*, p. 46.

<sup>1</sup> *Op. cit.*, p. 14. Compare also Marburg (*Proc. Amer. Soc. for Jud. Settlement of Disputes*, p. xiv) who remarks that the aim of a

questions of a purely legal nature to be susceptible of arbitration and it was hoped that the permanent tribunal thus created would be able to decide the disputes submitted to it, in accordance with rules of law rather than according to equity.<sup>1</sup> It is asserted, however, that the decisions of the court have frequently been based on compromise rather than strict respect for the law and that in some cases they have been contrary to the established rules of international law.<sup>2</sup> Wehberg and others think the Hague Conference made a mistake in endeavoring to introduce into the field of international arbitration the requirement that decisions should be rendered in accordance with strict legal rules. The attempt, he says, was bound to fail because of the incompatibility between arbitration and judicial settlement. If the Conference wished legal decisions rather than arbitral awards it should have created a court of justice instead of an arbitration tribunal. What it evidently had in mind was primarily the creation of an organ for the promotion of arbitral settlements and not the establishment of a real judicial court. "But in its noble zeal, it thought it could serve two masters, and the result was a mongrel institution which is neither wholly judicial settlement nor yet international

court of arbitration is to compose differences, and the spirit of compromise which prevails as a result thereof can hardly yield lasting principles of law or justice. See also W. C. Dennis, *Columbia Law Review*, 1911, p. 502, who points out that the explanation of the compromise feature of arbitral awards is to be found in the very nature of arbitration itself as contradistinguished from judicial settlement.

<sup>1</sup> Compare Scott in 2 *Amer. Jour.*, p. 773, and Wehberg, p. 15.

<sup>2</sup> See review of the cases in Wehberg, pp. 29 ff., and the opinions of various authorities there cited in support of this view. A French writer Robin (*Revue Générale de Droit Int. Pub.*, 1911, p. 351) goes to the length of saying that "the Hague Court regards its functions as those of a mediator not less than those of a judge." See also the criticism of de Louter, who after referring to various cases in which the Hague Court is alleged to have based its decisions on compromise or policy, concludes that "it does not offer sufficient guarantees against the penetration of elements absolutely foreign to the law." 19 *Rev. Gén.*, pp. 288-290.

arbitration."<sup>1</sup> Another fundamental difference between a court of justice and a tribunal of arbitration, and this distinction was fully reflected in the organization of the Hague tribunal, is that the judges of a court of justice are not selected by the parties to the cases which it is called upon to decide, whereas in arbitration the parties select their own judges, and what is still more objectionable, all of the latter or a majority of them may be, and frequently are, nationals of the contending parties. A tribunal so constituted can offer no guarantee of impartiality because the judges will be under a natural temptation to decide in favor of the claims of their own government. In a certain sense it makes the parties judges in their own cases, contrary to one of the oldest and most fundamental principles governing the administration of justice. In this and other respects the Hague Court falls far short of the ideal. The ideal requires a court composed not only of permanently appointed judges of

<sup>1</sup> *Op. cit.*, p. 40. This opinion, as well as the criticism directed against the Hague Court on the ground that its decisions have too often been based on compromise rather than upon rules of law, is a bit severe. In fact compromise does not necessarily mean the splitting of differences or the adding up of the claims of both parties and dividing the result by two, as some of the criticisms seem to assume. Decisions of municipal courts are sometimes criticised on the ground that they are mere compromises. That the element of compromise is by no means lacking in the decisions of municipal courts may be seen from a study of the admirable treatise of Judge Cordoza, *The Nature of the Judicial Process*. A certain element of compromise may be necessary to a decision, it may require a balancing of competing interests. It is going too far, therefore, to say that arbitration tribunals do not feel obliged to follow rules of law, where they exist, in reaching their decisions. Generally, international tribunals, whether they be called courts of arbitration or judicial courts, will travel along essentially the same path in reaching decisions in the cases referred to them. Compare Hudson, 35 *Harvard Law Review*, pp. 253-254; Borchard, *Illinois Law Quarterly*, p. 68; Moore, *Procs. Acad. of Pol. Sci.* Vol. 7 (1917), p. 22; and Ralston, *International Arbitral Law and Procedure* (sec. 127), who declares that arbitral tribunals "have always treated international law as a rule of guidance." A study of the collections of arbitral decisions, such as Moore's Digest, and the analyses in such treatises as Ralston's cited above, will show that rules of law are generally applied by arbitral tribunals in reaching their decisions.



experience and training but judges whose selection is not left to the parties and who are not nationals of the litigating countries.<sup>1</sup> The defects of the Hague Court have been dwelt upon by many jurists and publicists.<sup>2</sup> The best that can be said of it, perhaps, is that its creation marked an important step in advance; it represented the initial process in a movement which was destined to result in the ultimate creation of a real court. This movement gathered strength as the defects of the Hague tribunal were more and more revealed. The Interparliamentary Union at its meeting in 1900 adopted a resolution strongly recommending the creation of a truly permanent court of justice and this demand was reinforced by the action of other groups and individuals, particularly in England and the United States. The meeting of the Second Hague Conference in 1907 afforded an opportunity to make another effort to carry forward the unfinished work of 1899. The American government, whose delegation had endeavored to secure the establishment of such a court in 1899, was still heartily in favor of it, and Secretary Root in his instructions to the delegates to the second conference directed them to make another effort to this end. Adverting to the weakness of arbitration as a means of settling disputes, he declared that the principal objection was the unwillingness of nations to have recourse to it because of their apprehension

<sup>1</sup> Compare Wehberg, Ch. IV, and the opinions there cited.

<sup>2</sup> Some of the defects of the Hague Court are pointed out by Ralston in an article entitled "Suggestions as to the Permanent Court of Arbitration" in 1 *Amer. Jour.*, pp. 321 ff. One defect lies in the fact that the judges are too largely under the control of and too likely to represent the official views of the appointing government, since they are frequently the regular legal or diplomatic advisers of their governments. No government official should therefore be eligible to membership on the court. Furthermore, no judge of the court should be permitted to appear as counsel before it. Again, no national of a litigating country should be permitted to sit as a judge in a case in which his country is a party, and, finally, the parties should not be allowed to choose the judges who are to decide their case; though they might be allowed the right of challenge as in jury trials by municipal courts. Certain of these defects in the original court were removed by the Convention of 1907.

that arbitrators might not be impartial. Referring to the distinction between arbitration and judicial settlement and the superiority of a judicial court to an arbitral tribunal he said :

"It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process. If there could be a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different States, or between foreign citizens and citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration. It should be your effort to bring about in the Second Conference a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court shall be made of such dignity, consideration, and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments."

When the conference assembled, plans for a court were presented by the American, Russian and British delegations.<sup>1</sup> The American plan provided for a permanent court composed of a relatively small number of judges who were to be paid a fixed salary by the nations in common and who were to represent the principal legal systems and languages of the world, as contradistinguished from a mere panel or list of judges from which the parties would be obliged to choose their arbiters as occasion required.<sup>2</sup> Mr. Choate in presenting the plan dwelt upon the defects of the so-called court of 1899: its lack of the element of permanency and consequently its incapacity for developing a continuous body of international law, its expensiveness, the delays involved in setting its machinery into motion, and the infrequency with which governments had resorted to the court, for these and other reasons.

Mr. Choate's impressive argument found able supporters in Mm. Bourgeois, Martens, Asser, and others. M. Bourgeois, dwelt upon the distinction between controversies of a political character and those of a legal nature. For the former class of disputes, the old court of 1899 might be preferred and should be left untouched, but for those in the second class "a real court composed of real jurists" was desirable. M. Asser, the distinguished Dutch jurist, alluding to the defects of the so-called permanent court of 1899, said: "Instead of a permanent court, the convention of 1899 gave only the phantom of a court, an impalpable specter, or, to speak more precisely, it gave a secretariat and a list"; and he added: "I hope that we will not separate without having rendered recourse to arbitration easier both by the revision of the rules of procedure and by

<sup>1</sup> The history of these plans and the final conclusions are detailed by Mr. D. P. Myers in 10 *Amer. Jour. of Int. Law*, pp. 270 ff. See also Scott, *ibid.*, Vol. II, pp. 772 ff.

<sup>2</sup> The American project served as a basis for discussion but it was finally withdrawn in favor of a common project of the American, English, and German delegations.

establishing in the body of the court of arbitration a permanent tribunal with a competence more or less extensive.<sup>1</sup> Baron Marschall von Bieberstein of Germany pledged the support of Germany. "It is the great merit of the first Conference," he said, "to have indicated to us the road we must follow. A real, permanent court, composed of judges who by their character and ability shall enjoy universal confidence, will exercise an attraction, automatic as it were, for judicial differences of every sort. And such an institution will assure to arbitration an employment more frequent and extensive than a general compromisory clause which would have to be surrounded with evasions, reserves and restriction. We are ready to employ all our forces to elaborate in the accomplishment of this task."<sup>2</sup>

Regarding the desirability of establishing such a court the Conference was almost unanimous; there were some differences of opinion as to the details of its organization, but these were easily reconciled and a convention was concluded for the creation of a court of arbitral justice<sup>3</sup> which should be "free and easy of access," and composed of judges representing the various legal systems of the world and capable of ensuring continuity in jurisprudence of arbitration. The court was to be composed of judges appointed for a term of twelve years, chosen from persons of the highest moral reputation, fulfilling the conditions required in their respective countries for appointment to the highest legal posts or be jurists of recognized competence in matters of international law. The court was not to supersede

<sup>1</sup> Quoted by Myers in 10 *Amer. Jour.*, 281.

<sup>2</sup> *Ibid.*, p. 282.

<sup>3</sup> The name chosen in the first draft was the "high international court of justice" but some objections being urged against its designation as a "high court," on the ground that it indicated the existence of inferior courts from which appeals might be taken and that for other reasons it might cause misunderstanding as to the real character of the court, the name was changed to the "court of arbitral justice." Evidently there was a desire among some delegates that a name should be chosen which would emphasize the arbitral character of the tribunal as well as its judicial character.

the Hague tribunal of 1899; that tribunal was to be retained and could be resorted to by any powers which might prefer it to the new court. The permanent seat of the court was to be at the Hague, it was to meet annually and the judges were to receive a modest fixed salary paid by the signatory powers in common. Its jurisdiction was to embrace all matters submitted to it by virtue either of a general undertaking or a special agreement. It would be "free and easy of access" in the sense that its expenses would be borne by the powers in common and that it would always be organized and ready to proceed immediately with the hearing of any cases which the parties might wish to submit to it without the long delays involved in choosing the judges and defining their powers and the issues to be passed upon. It would insure continuity in jurisprudence because it would be permanent in the sense that the same judges would hear a succession of cases and although the decision in one case would not be absolutely binding on the court in a subsequent case it would, nevertheless, constitute a precedent and would no doubt be generally followed.<sup>1</sup> To some, the principal defect of the proposed court was that its jurisdiction was to be entirely voluntary, since it was to be given competence of only such matters as the parties might by general or special agreement confer upon it.

Unfortunately there remained yet one question to be solved before the court could be brought into existence and this proved to be the rock upon which all the hopes of its friends were wrecked. That was the problem of the method of selecting the judges. Necessarily, if the tribunal was to be a court of justice the number of judges must be limited. It was proposed that seventeen would be a suitable number. But as forty-four states were represented at the Conference how could that

<sup>1</sup> Compare Scott in 2 *Amer. Jour.*, p. 789. The various articles of the draft convention are explained and commented on in Scott's Report to the Conference.

number of judges be apportioned among so large a number of states so as to allow each state, a judge? The Brazilian project proposed that each state large or small, should be allowed to designate one judge. This plan, which represented the view of the smaller states generally, was based on the principle of absolute equality, but it was naturally unacceptable to the large powers, not only upon grounds of justice and public policy, but because it would have resulted in the creation of an unwieldy assembly rather than a workable judicial court. Various proposals were made to reconcile the differences of the two parties, but they all came to naught.<sup>1</sup> The whole matter of the selection of the judges therefore was left unsettled and it was recommended that the powers should, if possible, come to an agreement and organize the court for the creation of which practically all of them had voted. In 1914 a movement was initiated by the Dutch ministry of foreign affairs for the organization of the court by those powers that were willing to participate in it but before the negotiations were under way the Great War had broken out and nothing further came of the project.<sup>2</sup> The

<sup>1</sup> They are discussed by Scott in 2 *Amer. Jour.*, pp. 803 ff. See also Choate, *op. cit.*, pp. 78-79. A good estimate of the court may be found in the Report of the American delegation to the Secretary of State.

<sup>2</sup> Myers, 10 *Amer. Jour.*, 309. In 1909 the Secretary of State of the U. S., Mr. Knox, proposed that the court of arbitral justice be constituted by investing the international prize court, for the creation of which the Conference of 1907 had voted, with the jurisdiction and functions of a court of arbitral justice. As the organization of both courts was substantially the same, he thought it would be feasible to do this for any and all nations consenting thereto. Accordingly a proposal to this effect was addressed to the powers (Text in 4 *Amer. Jour.*, Supp., pp. 102) but the rejection of the prize court convention by Great Britain put an end to the project. The Knox proposal was warmly advocated by speakers at the Lake Mohonk Conference on Arbitration in 1910 and by the Universal Peace Congress at Stockholm in the same year. German jurists like Wehberg, however, attacked it on the ground that the composition of the court, dominated as it would be by the great powers, rendered it unsuitable for the decision of controversies arising in time of peace. It would not be fair to the small states with so little representation on the court to have their cases decided by a court which had

court therefore was never brought into existence and the so-called permanent court of arbitration of 1899 remained the only tribunal to which the nations might resort for the settlement of their disputes. Happily it was not entirely forgotten and recourse to it at infrequent intervals has continued to the present day.

Although the project of the Second Conference for the creation of a general permanent international court failed, owing to its inability to reach an agreement upon the method of choosing the judges, it achieved complete success in the creation of an international prize court. For a long time there had been developing a sentiment of dissatisfaction with the existing system of prize adjudication, according to which the legality of captures of both enemy and neutral vessels is determined by prize courts constituted by the captor's country and in accordance with its own prize law. True it had long been a theory of prize jurisprudence that a prize court, although constituted by the belligerent and composed wholly of judges representing their own country, was an international court and as such was bound to administer international law.<sup>1</sup> But this was more of a fiction than a reality. A court established by a belligerent, which sits in his own territory and which is composed of judges of his own selection and who are always nationals of the country appointing them is in fact a national court whatever may be the legal theory of the judges as to its

been created for the decision of a limited class of questions in which they had little interest. They had consented to forego the right of equal representation in the prize court only because it was to be restricted to decisions on questions of maritime law; it could not therefore be given the general jurisdiction of the court of arbitral justice. See Wehberg, *op. cit.*, pp. 164-167. At the meeting of the Interparliamentary Union at Brussels in 1910 all the speakers except those from the U.S. opposed the Knox proposal.

<sup>1</sup> On the nature of prize courts and doctrine of Lord Stowell regarding the duty of prize judges to apply the rules of international law in reaching their decisions, see Phillimore, *International Law*, Vol. 3, pp. 648 ff.

character. In fact also the law which national prize courts apply is the prize law of their own country; they apply international law only when their own prize law is in conformity with it; when there is a divergence between the two, the national prize law is given the preference. Under such circumstances it is not unnatural that there should have been many complaints on the part of both belligerents and neutrals that courts so constituted and so bound, failed to inspire confidence in their impartiality, even where there was no suspicion as to the honesty and the integrity of the judges.<sup>1</sup> So long as human nature is what it is, judges of national prize courts influenced by patriotism and the natural desire to sustain and encourage the naval forces of their own country which may be engaged in a life and death struggle, will be biased, if even unconsciously, in favor of the claims of their government. The frequency with which the judgments of prize courts have been made the subject of diplomatic complaint and protest and their submission anew to mixed commissions whose decisions have often been adverse to the claims of captors, would seem to establish beyond doubt that prize courts as now constituted lack the impartiality which could be expected of an international

<sup>1</sup> As long ago as the 18th century Hubner protested against the practice which virtually made captors the judges in their own cases and he even denied the right of a belligerent prize court to pass upon the legality of capture of neutral prizes, and advocated the establishment of mixed courts. See Hautefeuille, *Des Droits et des Devoirs de Neutres*, Vol. III, pp. 296 ff., and Gessner, in the *Revue de Droit International*, Vol. 13, pp. 260 ff., where the movement of opinion against the existing system is discussed.

At the 1874 meeting of the Institute of International Law Westlake proposed the creation of an international court of appeal in prize cases and in 1877 the Institute approved the idea. (*Annuaire*, 7, 185.)

In 1887 the Institute adopted a series of international rules concerning prizes, 10 articles of which dealt with the organization of an international court of appeal in prize cases. It was to be constituted *ad hoc* by the belligerents at the beginning of the war and was to be composed of a judge representing each of the belligerents and three judges representing neutral powers. Text in *Annuaire de l'Institut*, Vol. 9, pp. 311 ff.



tribunal.<sup>1</sup> To remove this source of complaint by substituting international for national judgment, the Second Conference adopted a Convention for the creation of an international prize court. Six states abstained from voting on the project but only one (Brazil) actually voted against it. The creation of the court represented therefore practically the unanimous desire of the Conference. Unlike the problem of the method of selecting the judges of the court of arbitral justice, little or no difficulty was encountered in reaching an agreement in respect to the appointment of the judges of the international prize court, mainly because the maritime interests of the smaller states being relatively insignificant they did not insist upon the principle of equality of representation upon the court. Both the German and British delegations presented plans for a court. The German plan was for an *ad hoc* tribunal to be created by the opposing belligerents upon the outbreak of war, following the proposal of the Institute of International Law in 1887.<sup>2</sup> The British plan provided for the creation of a permanent court to be composed of judges learned in maritime law, representing neutral as well as belligerent nations and, what was equally important, the court was to be created in time of peace, so that when war broke out, the belligerents would find the court already in existence and ready to hear cases submitted to it. The plan agreed upon was more nearly that proposed by the British delegation. The court was to be composed of fifteen judges paid by the powers in common,

<sup>1</sup> Compare the late Mr. Justice Brown of the United States Supreme Court in 2 *Amer. Jour.*, pp. 474-476; also the Report of the American delegation, 1907, to the Secretary of State, and Borchard, *Diplomatic Protection of Citizens Abroad*, p. 342. Dr. C. J. Colombo in an able address before the International Law Association in 1921 (Report of the Association, Vol. I, pp. 29 ff., pointed out the objections to the present system of prize adjudication and the great need of an international prize court. He shows, as I have attempted to do above, that national prize courts are bound to administer national prize law.

<sup>2</sup> *Annuaire*, 9, 311.

appointed for a term of six years and they were required to be "jurists of known proficiency in questions of international maritime law and of the highest moral reputation." Germany, the United States, Austria Hungary, France, Great Britain, Italy, Japan, and Russia were always to be represented on the Court. Judges representing the other powers were to sit in turn according to a scheme of rotation. A belligerent power having a case before the court was accorded the right always to have a judge on the court in order to insure a careful consideration of the captor's claims, but the majority of the judges would be "strangers to the controversy" and the final decision would rest with them. This would insure a greater guarantee of impartiality than is offered by national prize courts as they are at present constituted. The court was, of course, to be established primarily to hear and determine the claims of belligerent and neutral states, but recognizing that there might be cases in which a government would not care to espouse the claim of one of its nationals and therefore appear as a party in his behalf, the convention provided that in such a case the individual himself should be allowed to appear and prosecute his claim. Here was a recognition for the first time of the fact that individuals as well as states may be subjects of international law.

The creation of the international prize court represented a distinct advance in the development of the machinery and processes of international justice and it was said at the time that if the conference had done nothing more, that in itself would have abundantly justified its calling.<sup>1</sup> It may be

<sup>1</sup> Such was the opinion of Mr. Justice Brown of the U. S. Supreme Court, 2 *Amer. Jour.*, 476. Sir Edward Fry, head of the British delegation, considered the international prize court the most remarkable achievement of the conference. "It is the first time in the history of the world," he said, "that there has been organized a truly international court." Compare also Choate, *op. cit.*, p. 72, and the Report of the American delegation to the Second Conference.

For a bibliography of the literature on the proposed international prize court see Fauchille, *Droit Int. Pub., Guerre et Neutralité*, p. 572.

remarked also that it provided for the first time for compulsory arbitration of a certain though limited number of controversies and gave to an international tribunal authority to override the decisions of national courts upon appeal.

While the conference was able to agree fully on every detail of organization, the mode of selection of the judges and the jurisdiction of the court, it never in fact came into existence because the convention was never ratified. The convention had charged the court in determining the cases submitted to it, with applying the "rules of international law," in the absence of treaty stipulations covering the questions at issue, and that in case no generally recognized rules of international law existed, "to decide in accordance with general principles of justice and equity." Unfortunately, then as now, there was a divergence of opinion and practice among states as to what were the rules of international law; the court therefore would have to determine in such cases what the law was. In short, it would be obliged to make the law itself instead of merely applying existing rules to the questions at issue. Certain delegates in fact saw at the outset that the conference was conferring upon the court law-making as well as judicial functions and for that reason hesitated to give their support. During the course of the discussion on the British project a Japanese delegate expressed the hope that "the conference would first arrive at an agreement on the codification of the rules affecting prize cases before instituting an international court" and it was understood that both Japan and Russia abstained from voting on the project, on the ground that the codification of the maritime law ought to precede the establishment of such a court.<sup>1</sup> When the convention was laid before the powers for ratification the British government decided to withhold its ratification until an agreement could be reached upon a code of rules of maritime law which the court should apply. With

<sup>1</sup> See Gregory, in 2 *Amer. Journal*, p. 459.

this object in view it called an international conference which met in London in December, 1908, and which framed a code dealing with most of the matters of prize law which the court would have had to apply. But, as is well known, it proved unacceptable to the British government and it was never ratified by it or by any of the other governments. In consequence, the prize court was never organized, although the powers were practically unanimous in favor of creating it. It failed mainly because of the lack of a generally recognized body of law for it to minister and because no agreement could be reached upon such rules.<sup>1</sup>

<sup>1</sup> In the same year in which the second Hague Conference agreed upon the establishment of an international court of arbitral justice and an international prize court, an interesting though short-lived experiment in international judicial organization was launched by the five central American states of Honduras, Guatemala, Costa Rica, Nicaragua, and Salvador. By a convention concluded at Washington in December of that year these states created a Central-American court of justice to be located at Cartago, Costa Rica, to which they agreed to refer all disputes arising between two or more of them which could not be settled by diplomacy. The court was formally installed on May 25, 1908 under the most favorable auspices and in July following it decided its first case, one between Honduras, on the one side, and Guatemala and Salvador on the other. (*Amer. Jour. of Int. Law*, Vol. II, pp. 835 ff.) During the ensuing nine years of its existence it decided eight other cases which were submitted to it, some of which no doubt would have led to the outbreak of war between the disputants, had not the disputes been thus settled. Unfortunately, the court, which had begun its career under such favorable auspices and which gave so much promise of safeguarding the peace of Central America, came to an end in 1917 in consequence of events growing out of the conclusion in 1914 of a treaty between the United States and Nicaragua. By the terms of this treaty Nicaragua granted to the United States the exclusive right to construct a canal across its territory and ceded to the latter power a naval base in the Gulf of Fonseca and two small islands in the Caribbean Sea. Against this treaty the other Central American states protested on the ground that the treaty violated their right to be consulted in regard to the matter. Costa Rica accordingly brought a suit against Nicaragua in the Central American court of justice and by a decision rendered in September 30, 1916 the court sustained the claims of Costa Rica and held that Nicaragua had no legal power to enter into the treaty with the United States and as a result the treaty was null and void. The Nicaraguan government denied the competence of the court, on the ground that the issue was one

All attempts so far to create a court of international justice had failed, though it was not due to any opposition directed against the merits of such a court itself. On the contrary, the second Hague Conference had voted with practical unanimity in favor of both a general court of arbitral justice and an international prize court. Both failed to come into existence because of failure to reach an agreement as to subsidiary matters which did not affect the merits of either court.

At the Peace Conference following the close of the Great War there was a general opinion that whatever form of international organization was set up as a part of the peace arrangement, it should include a permanent court of justice. All the drafts of the covenant of the proposed League of Nations which came before the commission for consideration contemplated the establishment of such a court. Occupied, however, with a multiplicity of other questions of a more urgent character, the conference itself did not undertake to work out the details of its organization. This task was devolved upon the Council of

which arose before the establishment of the court, and it refused to appear at the hearing and protested against the decision. (In March, 1917, the court decided in favor of Salvador in a similar suit against Nicaragua.) The United States supported Nicaragua in the position which it assumed and declined to adopt a course which would remove the complaints of the other Central American States. In consequence of these decisions and of the attitude of the United States government the Central American Union which had been formed in 1907 ceased to exist in 1917 at the expiration of the ten-year period for which it was created, and the court of which it was the judicial organ likewise came to an end. A history of the creation of the court, and its work, together with a list of the cases decided by it may be found in *World Peace Foundation* pamphlet, "The New Pan-Americanism" (Vol. VII, No. 1).—Text of the convention creating the court, Appendix II. For a discussion of the controversy raised by the treaty between the U.S. and Nicaragua and the decisions of the court, see editorials in the *American Journal of International Law*, Vol. 10, pp. 344 ff., and Vol. 11, pp. 156 ff. For the text of the decisions of the court in the cases of Costa Rica and Salvador against Nicaragua see *ibid*, pp. 181 ff. and 674 ff. See also an article by Gonzalez, *ibid*, Vol. 10, pp. 509 ff., and an article in the *Revue Générale de Droit Int. Pub.*, Vol. 15, pp. 604 ff.

the League of Nations, which by Article 14 of the Covenant was charged with formulating plans, to be submitted to the members of the League for adoption, of a court which would be "competent to hear and determine any dispute of an international character which the parties thereto submit to it" and to give an "advisory opinion upon any dispute or question referred to it by the council or by the assembly." The council of the League, composed as it was, of diplomats and political men rather than of jurists, clearly recognized its own unfitness for the somewhat technical task of elaborating the details of the organization for the court and at its meeting at London in February, 1920, it decided to entrust the preparation of a draft statute to a committee of eminent jurists. The committee met at the Hague on June 16 and after listening to addresses by M. Karnebeek, the Dutch Minister of Foreign Affairs, M. Léon Bourgeois of France, and M. Descamps, it proceeded to its task, which, as M. Bourgeois told it, was to formulate a plan not for an arbitration tribunal to be organized *ad hoc* whenever the parties concerned desired to have recourse to it but for a permanent court of justice, to be "a judgment seat raised in the midst of the nations, where judges are always present, to whom can always be brought the appeal of the weak and to whom protests against the violation of law can be addressed."<sup>1</sup> The committee, it may be remarked, had before it various suggestions including the draft of a plan prepared by a conference of representatives of Denmark, the Netherlands, Norway, Sweden, and Switzerland. After five weeks of deliberation, which included thirty-five meetings, the

<sup>1</sup> Text of the addresses in League of Nations *Official Journal*, July-August, 1920, pp. 227 ff. The work of the committee is summarized by Scott in pamphlet No. 35 of the Division of International Law of the Carnegie Endowment for International Peace. See also Root's remarks on "The Constitution of an International Court of Justice" in 15 *Amer. Jour.*, pp. 1 ff.

committee agreed upon the draft of a plan and it was laid before the council of the League of Nations at its meeting at San Sebastian in August, 1920, by M. Bourgeois who explained its principal provisions and pointed out the solutions that had been adopted by the committee in regard to important matters such as the composition and jurisdiction of the court.<sup>1</sup> The plan was considered at this and the following meeting at Brussels in October and at the latter meeting the council approved with some modifications the draft prepared by the committee of

<sup>1</sup> Text of M. Bourgeois's report at the San Sebastian Meetings in *Official Journal* for September, 1920, pp. 318 ff. The draft of the committee of jurists for the establishment of a permanent court was accompanied by three recommendations: one for the summoning of a conference to fix and codify the rules of international law, the first conference to be followed by others at periodic intervals; one recommending the eventual establishment of a high court of justice for the trial of crimes committed in violation of the law of nations; and one relating to the international law academy at the Hague.

Regarding the first recommendation the council agreed to propose to the assembly that various organizations such as the Institute of International Law be invited to consider what subjects might be advantageously included in the program of an international conference and to inform the council thereof. The council would then submit to the members of the League a list of the subjects thus suggested for the program of the Conference and their views would be asked regarding the advisability of summoning it.

As to the second recommendation the council decided to adopt the same procedure as in the case of the first. The third recommendation was not addressed to the council. The International Law Academy with a special curatorium having been set up under the auspices of the Carnegie Foundation, the council decided to transmit the recommendation to it.

When these recommendations came before the Assembly they met with little favor. Regarding the Academy of International Law it decided that the proposed institution was a private affair and did not concern the League of Nations. As to the proposed high court of criminal justice, the assembly's decision was not required apart from the permanent court of international justice. Concerning the project for the codification of international law, the assembly on motion of Sir Robert Cecil rejected the recommendation of the council. Sir Robert did not think the time for codification had yet arrived and this view prevailed. See a pamphlet published by the World Peace Foundation entitled: "The First Assembly of the League of Nations," pp. 113-114. Text of the Committee's recommendations in Scott, *op. cit.*, pp. 133-134.

jurists and sent it thus revised to the assembly of the League.<sup>1</sup> The assembly referred the draft to a committee which studied it carefully and recommended several modifications. As thus modified the statute was finally adopted by the assembly and sent to the members of the League for their ratification, with a resolution providing that as soon as it was accepted by a majority of the members, that is, twenty-four governments, the statute of the court should come into force.<sup>2</sup> Adherence to the protocol was also permitted by non-members of the League,<sup>3</sup> which were mentioned in the annex to the covenant, that is, to states which were eligible to membership in the League but which had not yet joined it. When the second assembly of the League convened in September, 1921, the protocol had been signed by representatives of forty-two members of the League and ratified by twenty-nine of them and subsequent to this date the ratification of several other members was announced.<sup>4</sup> There remained only the election of the judges to bring the court into existence. This task was duly performed by the council and the assembly in September in accordance with the statute of the court and the court was formally opened at the Hague on January 30, 1922.<sup>4</sup>

<sup>1</sup> Text of M. Bourgeois's report, which was adopted by the Council, at the Brussels Meeting, *ibid*, Nov.-Dec., 1920, pp. 12 ff.

<sup>2</sup> *Official Journal of the League of Nations*, March-April, 1921, p. 154.

<sup>3</sup> See the *Official Journal* of the League for October, 1921, p. 807, for the list of states that had signed the protocol, and p. 809 for the states that had ratified the statute.

<sup>4</sup> The judges elected were: Altimira of Spain, Anzilotti of Italy, Barbosa of Brazil, de Bustamente of Cuba, Finlay of Great Britain, Huber of Switzerland, Loder of the Netherlands, Moore of the United States, Nyholm of Denmark, Oda of Japan, and Weiss of France. The following deputy judges were also elected: Beichmann of Norway, Negulesco of Roumania, Wang Chung-Hui of China, and Yovanovitch of Yugo-Slavia. A list of the nominees and the countries proposing them may be found in the *Official Journal* of the League for October, 1921, pp. 812 ff. A number of the judges chosen have had judicial experience in the highest courts of their countries and all of them are jurists of eminence and distinction.



We may now consider the constitution and jurisdiction of the court. The statute provides that it shall consist of fifteen members: <sup>1</sup> eleven judges and four deputy judges, who shall be elected "regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or who are jurisconsults of recognized competence in international law." This requirement insures that the court will be composed of judges, or at least of persons versed in international law, rather than of diplomats or political men such as were frequently selected to sit on the Hague court of arbitration. The statute also enjoined the electors to bear in mind that the judges chosen should not only possess the qualifications mentioned above but that the whole body should represent the "main forms of civilizations and the principal legal systems of the world." <sup>2</sup> The selection of the first judges was made in accordance with this view. The Anglo-American legal system is represented by two judges, the Continental system is represented by various European jurists to which may be added the Brazilian and Cuban judges, while the legal system of China and Japan are each represented by a judge. As to civilizations, those of the different parts of Europe, as well as of Asia, North America, and South America are each adequately represented. It may also be added that both large and small states are represented and so are both maritime and land powers. From

<sup>1</sup> Since there were several important states, notably Germany, the U.S. and Russia, which were not members of the League, it was thought advisable to authorize the assembly to increase the number of judges by three at its discretion in order that the abovementioned states might upon becoming members of the League be assured of representation upon the court. Article 4 of the statute allows this increase to be made.

<sup>2</sup> There was some opposition among the advisory committee of jurists to this provision but the sentiment in favor of having both the different legal systems and forms of civilization represented largely preponderated and it was adopted. See Scott's pamphlet referred to above, p. 65. As to this and other questions see also a book, G. M. Morellet, *L'Organisation de la Cour Permanente de Justice Internationale* (1921), especially, pp. 50 ff.

almost every point of view, in fact, the court as at present constituted is a fairly representative tribunal and it would be difficult to criticize it on this score.

Such are the qualifications required for membership on the court. The statute also lays down certain disqualifications. Thus Article 16 makes the holding of any political or administrative office<sup>1</sup> incompatible with membership of the court. This incompatibility is based on the principle that judges who occupy such positions under their own governments might lack the independence and freedom of opinion which is expected of those charged with judicial functions. It was further provided that no member of the court could act as agent, counsel, or advocate in any case of an international nature. It was thought that the members of the court should be judges and nothing else and they should not therefore be permitted to engage in the practice of law.<sup>2</sup> One of the criticisms directed against the Hague tribunal of arbitration, as originally constituted, was that the judges were permitted to appear as counsel before the arbitral boards constituted from the permanent panel and some of them in fact did so. The Convention of 1907 for the creation of a court of arbitral justice prohibited the judges from acting as counsel before the proposed court. An equally wise provision of the statute was that which prohibits any member of the court from taking part in the decision of a case in which he has previously served as agent or counsel for one of the contending parties or as a member of any international court or commission of inquiry or in any other capacity.

<sup>1</sup> The prohibition, however, was interpreted not to apply to members of legislative bodies and in fact two of the judges elected (Finlay and Altamira) are members of the upper chambers of the parliaments of their countries. Compare the remarks of Moore "The Permanent Court of International Justice," 22 *Columbia Law Review*, p. 509. As to the views expressed in the committee concerning incompatibilities see Morellet, *op. cit.*, pp. 71 ff.

<sup>2</sup> Compare Mr. Root's remarks, quoted by Scott, *op. cit.*, p. 75.

The terms for which the judges are elected was fixed at nine years.<sup>1</sup> It will be recalled that the term fixed upon for the judges of the proposed court of arbitral justice of 1907 was twelve years and that of the judges of the international prize court was six years. The advisory committee of jurists recommended a term of nine years for the judges of the permanent court of international justice and this was adopted by the council and the assembly. There appears to have been some sentiment in favor of a life tenure but it was not acceptable to a majority of the committee. It was thought advisable to adopt a fixed tenure, relatively short, and to make the judges eligible to re-election and this was done. The effect of these provisions is to give the court the character of permanency thus distinguishing it from the old Hague court of arbitration which was nothing more than a panel from which courts had to be created *ad hoc* whenever states desired to have recourse to it. It follows also, as a consequence, that the parties no longer choose their judges as they do ordinarily in arbitration procedure. For this very reason however, some states will no doubt prefer to take their cases before the old Hague court of arbitration<sup>2</sup> which, it may be remarked, has not been superseded by the new court but was left untouched and will be accessible, as before, to states which may desire to have recourse to it.<sup>3</sup> In all probability it will still be called upon to decide cases now and then as in the past. One great advantage of the new court is that it will always be organized and ready to decide cases submitted

<sup>1</sup> It results from this provision that there will be an election of the entire court every nine years. A system of partial renewal, say at three-year intervals, would perhaps have been preferable. Compare Moore, art. cited, p. 505, and Morellet, *op. cit.*, p. 67.

<sup>2</sup> Compare Borchard "The New International Court," in 1 *Illinois Law Quarterly*, p. 69.

<sup>3</sup> The Argentine delegation to the assembly of the League of Nations proposed that when the permanent court was once organized the Hague tribunal of arbitration should cease to exist. But the assembly by a large majority rejected the proposal.

to it, without the parties being under the necessity of bringing it into existence for the decision of the particular case which they desire to have adjudicated. And unlike the tribunals formed from the old Hague panel it will not go out of existence automatically when it has decided a case submitted to it. The court assembles annually at the Hague in the month of June and the President is authorized to summon extraordinary sessions whenever he considers it necessary. Little delay therefore will be caused to the parties who may desire to carry their disputes before the court.

The President and Registrar of the court are required to reside permanently at the Hague, but the other members are required to be in residence only when the business of the court requires their presence. It was felt that for a time, at least, the duties of the court would not be sufficient to require the continual residence of the other judges at the Hague, and that until then it would be an unnecessary hardship to compel them to take up a permanent residence at the seat of the court.<sup>1</sup>

Unlike the special tribunals organized out of the old Hague panel, the expenses of the new court are borne, not by the particular parties to the controversy, but by the nations in common, or to speak more exactly, by the League of Nations. The judges are to receive an annual salary, the amount of which is to be determined by the assembly of the League upon the proposal of the council and when once fixed it cannot be decreased during the period for which the judges are elected. The President receives a special grant and all judges and deputy judges are allowed an additional grant for the actual performance of their duties. Those who reside away from the Hague receive allowances for their travelling expenses. The assembly of the League on the proposal of the council is charged with making provision for a system of retiring pensions for the judges and officials of the court.

<sup>1</sup> Compare Scott, *op. cit.*, p. 80.

The salary of the judges was a subject of discussion by the advisory committee of jurists and all were agreed that they should be paid a sum in keeping with the position of a member of a world court, and that it should be paid out of a common treasury. Lord Phillimore suggested a lump sum of 6,000 pounds sterling for each judge but this amount seemed excessive to the representatives of the continental countries where judicial salaries are low. No agreement on the subject was reached and it was accordingly left to be determined by the council and the assembly of the League. The salary actually fixed is 15,000 Dutch florins for each judge. The President receives an additional special allowance of 45,000 florins, while the other judges receive duty allowances up to a maximum of 20,000 florins, the exact amount depending on the number of days of service. Each judge also receives an allowance of 50 florins per day for each day's residence at the Hague. The amount is considerably smaller than the highest judges of England receive but it is somewhat larger than the continental scale of judicial salaries. It is, however, adequate for the maintenance of the judges to whom the honor and eminence of their positions will be in some measure the chief reward.

We turn now to the mode of choosing the judges. It will be recalled that this difficult problem proved to be the rock upon which the Conference of 1907 split, in its efforts to create a permanent court of arbitral justice. It was the impossibility of reconciling the demands of the large states for permanent representation on the Court, with the equally insistent demands of the small states for equality of representation, that prevented an agreement. Among the advisory committee of jurists the same difference of view prevailed and for some time the possibility of agreement appeared unpromising. In this situation Mr. Root, recalling the solution that had been reached by the framers of the Constitution of the U.S. when the conflict between the views of the large and small states had threatened to disrupt the constitutional convention,

suggested that the organization of the League of Nations with its council representing, in the main, the great powers, and the assembly which was dominated by the small states might be utilized for reconciling the present conflicting demands. He therefore proposed that the judges should be elected by the council and the assembly acting concurrently. Each would be in a position to veto the choice of the other; in this way both the large and the small states would collaborate on an equal footing in the selection of the judges and no judge would be chosen who was not approved by the representatives of both groups of states. This happy solution of the difficult question was recommended by the committee of jurists and it was adopted by the council and the assembly and became a part of the statute of the court.<sup>1</sup>

There remained the question of the nomination of the candidates. The Argentine representatives in the assembly of the League of Nations proposed that the governments of the various states composing the League should present their candidates and this proposal was supported by the Scandinavian delegates, and particularly by those of Norway, but it was rejected, mainly on the ground that presentations by governments might lead to the nomination of political men rather than eminent jurists, and that judges so elected might lack the independence which they would feel in case they did not owe their nomination to their own governments. In the committee of jurists, Baron Descamps of Belgium had advocated the election of the judges by the members of the permanent court of arbitration but this proposal was rejected for the reason that it would have placed the new court in a certain position of dependence upon the old court.<sup>2</sup> But if it was not considered

<sup>1</sup> See on this point Scott, *op. cit.*, pp. 20 ff. Root's remarks, 15 *Amer. Jour.*, pp. 2 ff.; Bourquin, *La Cour de Justice internationale*, in the *Revue de Droit Int. et de Lég. Comparée*, 1921, pp. 23 ff.; Lord Phillimore, VI, *Grotius Society Transactions*, p. 90, and Morellet, *op. cit.*, pp. 62 ff.

<sup>2</sup> See Lapradelle's Report quoted by Bourquin, article cited, p. 122.

desirable to entrust the election of the judges to the members of the old Hague court of arbitration there would be obvious advantages in allowing them to designate the candidates from whom the council and the assembly might make the final choice, for no body of persons could be more competent to propose the best qualified international jurists for membership on the court.<sup>1</sup> This solution of the question was recommended by the committee of jurists and it was adopted by the council and the assembly of the League. In each country the small group of persons who are judges of the permanent court of arbitration<sup>2</sup> are allowed to nominate not more than four persons (of whom not more than two shall be of their own nationality). The statute recommends that before making their nominations they consult the highest courts of justice, law faculties, national academies and national sections of international academies devoted to the study of law. The lists of nominees are transmitted to the Secretary General of the League of Nations who submits them to the council and the assembly. From these lists the judges are elected by an absolute majority of votes in the council and the assembly. This procedure of election was tested out for the first time in September, 1921, when the present judges of the court were elected and an agreement was reached between the assembly and the council without serious deadlocks or delays. Eighty-nine persons were nominated; the representatives of 42 members of the League participated in the election, and the whole process was completed within three days.<sup>3</sup>

<sup>1</sup> Compare the remarks of Lord Phillimore, one of the members of the committee, who says the idea is a "little artificial but it has its advantages." VI *Grot. Soc. Transactions*, p. 91.

<sup>2</sup> A list of the members of the Hague panel, of the various countries in June, 1921, may be found in the *Off. Jour. of the League of Nations*, for July-Aug., 1921, pp. 418 ff. There were altogether 127 members. The groups of a number of countries did not participate in the nominations.

<sup>3</sup> The list of the candidates proposed by the different countries, may be found in the *Official Journal* of the League for July-August, 1921, pp. 418 ff.

The jurisdiction of the court is fully defined by the statute creating it. In the first place it is open only to states and to certain dominions, such as Canada, Australia, and other like members of the League of Nations. Unlike the proposed international prize court of 1907 individuals are not permitted in any case to take their complaints before the court.<sup>1</sup> Created primarily as a judicial organ for the League of Nations its competence is not however restricted exclusively to the hearing of controversies between members of the League, for it is expressly provided in the statute that it shall be open not only to states which are members of the League, but also to those countries, like the United States, which are mentioned in the Annex to the Covenant but which have not joined the League.<sup>2</sup> As to non-members of the League, such as the Dominican Republic, Germany, Mexico, Russia, and Turkey, they shall be allowed access to the court as plaintiffs upon conditions prescribed by the Council of the League, but the statute adds that in no case shall such conditions "place the parties in a position of inequality before the court."

As to the nature of the court's jurisdiction, and especially as to whether it should be purely voluntary or obligatory, much difficulty was encountered in reaching an agreement. Among the advisory committee of jurists, the Japanese representative alone favored limiting the jurisdiction of the court to such matters only as the parties might choose to submit to it, this

<sup>1</sup> Lord Phillimore states that some "mischievous suggestions" were made which would have gone to the length of enabling a citizen to sue his own state before the International Court and that a proposal was made which met with some favor, allowing a state to take up the cause of any of its own nationals and make it its own, but "when we came," he says, "to work this out, we found that we should have to frame some formula which would enable the state to take the cause, not only of its own nationals, but also of the subjects of some protected state." Article cited, p. 92.

<sup>2</sup> When states not members of the League are parties the court will fix the amount which they will contribute toward the expenses of the court.



for the reason that in his opinion the matter was already determined by Article 14 of the covenant which provides that "the court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it." The other members of the committee, however, took the position that they were charged with the preparation of a plan for the establishment of a court of justice, rather than a court of arbitration and that one of the distinguishing features of a court of justice is that it may hear and determine controversies falling within the scope of its jurisdiction without the necessity of an agreement between the parties to submit the dispute to the court. In other words, a court of justice possesses what is usually described as "obligatory" jurisdiction and whenever a plaintiff appears before the court with a case and the defendant does not respond, the court may proceed to hear it and give judgment in the absence of the defendant.<sup>1</sup> If the court were left with jurisdiction only of such cases as the parties voluntarily agreed to refer to it, it would be no different from the old tribunal of arbitration except as regards its permanency and the method of choosing the judges. In every case where the controversy was submitted to the court a *compromis* or preliminary agreement between the parties would still be necessary. They maintained that no such special agreement was required by the covenant. Article 13, it was pointed out, bound the members of the League to submit to arbitration

<sup>1</sup> The other members of the committee, says Scott (*op. cit.*, p. 124) "were of the opinion that justice should not be obliged to wait upon a party which was unwilling to have its conduct tested by the rules of law applicable to the dispute." In their opinion the plaintiff should have a right to present his case to the court and to proceed in the absence of the defendant who after proper notification should fail to appear.

Lord Phillimore says, "we wanted a real court to which a complaining state could come with its complaint, and request that the state complained of should be cited as a defendant. We felt that if the parties had got so far as agreeing to come and submit their disputes, they had already got a long way towards agreement, and that what we wanted to deal with were cases where the parties had not got so far." See his article cited, p. 93.

any dispute which they recognized to be suitable for submission to arbitration and which could not be settled by diplomacy; and that the four classes of disputes mentioned in that article (disputes as to the interpretation of a treaty, questions of international law, the existence of any fact which, if established, would constitute a breach of an international obligation and the extent and nature of the reparation to be made for such breaches) were declared by the same article to be among those which are generally suitable for submission to arbitration. In short, the members of the League had already obligated themselves by Articles 13 and 14 of the covenant to submit to arbitration (which must be interpreted to include also judicial settlement) all such disputes. Moreover, if that were not enough, the acceptance of the proposed statute of the court, containing the article suggested by the committee, would be equivalent to a general consent on the part of the powers to the court's assuming jurisdiction in such cases and hence the parties would not need to conclude in advance a special agreement for the submission of each dispute to the court.<sup>1</sup>

The draft of the committee of jurists embodied this view of the court's jurisdiction. It provided that whenever a party

• <sup>1</sup> Compare Scott, *op. cit.*, pp. 96 ff.; also his article on "The Aim of an International Court of Justice," in the *Annals of the American Academy of Pol. & Soc. Sci.*, July, 1921, pp. 102 ff. See also Bourquin, art. cited, p. 29, and the observations of M. Bourgeois in his Report on the draft plan of the committee of jurists, *Off. Jour. of the League*, Nov.-Dec., 1920, p. 14. Judge Loder, now President of the Court, in an article in the *British Year Book of International Law* for 1921-2 (pp. 6 ff.) argues that the articles of the covenant of the League relating to the permanent court show that it was the intention to give the court obligatory jurisdiction and that this intention was strengthened by the unanimous acceptance by the 44 states represented at the second Hague Conference of "the principle of obligatory jurisdiction," especially as regards disputes relative to the interpretation of treaties. It could not be supposed, therefore, that it was the intention of the authors of the covenant to abandon in 1919 a principle which had been unanimously endorsed by the powers in 1907. Finally, what was intended to be created was a "court of justice" and not an arbitration tribunal, and obligatory jurisdiction was an essential constituent element of such a court.

should bring a complaint before the court, it should hear the case and if the defendant state failed to appear, the court might, if satisfied that it had jurisdiction, give judgment in the absence of the defendant.<sup>1</sup> If the complaint involved any of the four categories of questions enumerated in Article 13 of the covenant, mentioned above, the court should have jurisdiction and this *without any special convention giving it jurisdiction*.

When the committee's draft was laid before the council and the assembly its recommendations regarding the competence of the court encountered strong opposition not only by those who considered them as being inconsistent with Article 14 of the covenant but by some who were opposed in principle to giving the court what was tantamount to the power of hailing a sovereign state before the bar against its will and of giving judgment against it in case it failed to appear. Mr. Balfour, in particular, expressed fear that it would be dangerous to vest the court with such jurisdiction because the rules of international law which it was charged with applying were not settled. It would be wiser, therefore, to begin with a court whose competence was restricted to disputes which the nations might voluntarily submit to it and with the increase of popular confidence it would gradually acquire larger powers and a more extensive jurisdiction. "More and more," he said, "you will find that as this court gains the public confidence, the confidence of nations in all parts of the earth, more and more classes of cases will be brought within its jurisdiction; more and more readily will the various countries of the world be glad to put their disputes before it, whereas if in a spirit, too hasty and too impetuous, you try to force into this mold, as yet imperfectly framed, the whole fabric of what you conceive to be a completed and perfect system, the result will be that the mold itself will break under the stress of new circumstances and changing conditions. So far from having served the

<sup>1</sup> Articles 33 and 52 of the committee's draft.

interests of international justice, you will have inflicted what may prove to be a fatal blow upon the greatest instrument which the world has ever yet been able to contrive for seeing that international justice is being carried out."<sup>1</sup>

The recommendations of the committee of jurists were therefore rejected and in their stead was inserted an article which limits the jurisdiction of the court to "all cases *which the parties refer to it* and all matters specially provided for in treaties and conventions in force."<sup>2</sup>

In the judgment of some jurists the effect of the change was to reduce the court to the level of an arbitration tribunal and there was keen disappointment in many quarters over the action of the council and the assembly in thus mutilating the project of the committee of jurists.<sup>3</sup> There are others, however, who believe that the time is not yet ripe for the establishment of an international court vested with the large competence which the committee of jurists proposed, and that if it were done, many states would decline to become members of it. This fear is all the greater because of the lack of a fixed and definite body of rules of international law by which the court would be bound in reaching its decisions. Before giving the court compulsory jurisdiction therefore a "universally accepted code of international law which it can apply to all the controversies that come before it" must be formulated and accepted.<sup>4</sup>

<sup>1</sup> Quoted in *World Peace Foundation* pamphlet; "The First Assembly of the League of Nations," p. 111.

<sup>2</sup> Article 36.

<sup>3</sup> Compare Scott in the *Annals of the Amer. Acad. of Pol. and Soc. Sci.*, July, 1921, p. 105; Lord Phillimore, VI, *Grot. Soc. Transactions*, p. 93; Loder, article cited, p. 23; Borchard, art. cited, p. 69; Whittuck, V. *Grot. Soc. Transactions*, p. 43; and Sir Erle Richards, *British Year Book of Int. Law*, 1921-22, p. 1. The last mentioned jurist, however, while admitting that the court without the power of compulsory summons is "in substance little more than a court of arbitration," nevertheless is opposed to giving it such power until an agreement has been reached as to the law which the court shall apply.

<sup>4</sup> Compare the views of Herbert A. Smith in an article entitled "The Jurisdiction and Powers of an International Court" in the *Annals*

It is argued, moreover, that the principle of compulsory jurisdiction is not a necessary condition to the establishment of an international court of justice; in fact some national courts began their careers with only voluntary jurisdiction over certain classes of controversies and gradually acquired compulsory competence through the development of public confidence in their impartiality. The analogy of the United States Supreme Court which has compulsory jurisdiction over controversies between the states which compose the federal union cannot be invoked as an argument for vesting an international court with similar jurisdiction over disputes between sovereign and independent nations because the Supreme Court is the creation of a single sovereignty and its jurisdiction is restricted to disputes arising within the territory of a single state.<sup>1</sup>

It would seem, however, that the preponderance of argument is in favor of the principle recommended by the committee of jurists. Voluntary arbitration has reached the limit of its usefulness and further progress in the

*of the Amer. Acad. of Pol. and Soc. Science* for July, 1921, pp. 107 ff.; also an article by Prof. C. G. Fenwick, *ibid*, pp. 118 ff. Sir Erle Richards, in the article cited above, argues against the advisability of giving the court obligatory jurisdiction "until the law of nations is defined with greater exactness." "The appreciation of ascertained or recognized law, is, he says, a task which may within certain limits, be properly entrusted to the court, but the determination of the law in cases in which the usage of different nations is not uniform, and in some cases actually opposed, is a function which lies beyond the competence of a judicial tribunal. The differences as to what the law is, and they are numerous, and important, especially in the field of maritime law, should be settled by international agreement and not by judicial process" (p. 2.) Compare also Lansing (13 *Amer. Jour.*, p. 638) who thinks that the adoption of "an international code of principles for the guidance of an international court of justice is as essential as the creation of the court itself," but that a "simple and concise" body of such principles would be sufficient and that agreement upon them ought not to be difficult." Compare also Brown in *Amer. Jour.*, 1922, p. 256.

<sup>1</sup> Compare Wickersham in an article entitled "Compulsory Arbitration not essential to an Effective World Organization," pp. 114 ff, in the *Annals of the Amer. Acad.*, etc., July, 1921.

judicial settlement of disputes requires the establishment of a court with competence to hear and determine international disputes of a justiciable character whenever they are properly brought before the court by the complaining party and this assumption of jurisdiction should not be dependent upon the willingness or unwillingness of the defendant party to appear, nor should it necessitate the conclusion of a preliminary special agreement between the parties. This is a logical and necessary step in the further development of the processes of international justice. The creation of a permanent court constitutes an important landmark in the history of this development but the failure to confer upon it adequate jurisdiction will have the effect of greatly diminishing its possible usefulness. In consequence, it falls far short of the ideal and it is to be hoped that increasing confidence in it will ultimately lead to an extension of its competence.

There was much dissatisfaction and disappointment, especially among the representatives of the small states, at the action of the council and the assembly of the League of Nations in refusing to confer upon the court the competence which the committee of jurists recommended.<sup>1</sup> They felt that without compulsory jurisdiction the creation of the court would represent little progress over the existing system for the settlement of international controversies. They accordingly insisted that provision should be made in the statute by which those which preferred to give the court compulsory jurisdiction of disputes, as among themselves, might do so. This was done by the addition of a clause which empowered the members of the League, either when signing or ratifying the protocol of the statute, or at a

<sup>1</sup> See some of the opinions expressed by them, in *World Peace Foundation* pamphlet : "The First Assembly of the League of Nations," pp. 108 ff. Judge Loder in his article cited above (p. 23) remarks that but for the unanimity requirement in the procedure of the assembly of the League, the proposal to give the court compulsory jurisdiction would have been carried by a large majority.

later date, to declare that they recognized as compulsory, *ipso facto* and without special agreement, in relation to any other member or state accepting the same obligation, the jurisdiction of the court in all or any of the classes of legal disputes concerning :

- (a) the interpretation of a treaty ;
- (b) any question of international law ;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation ;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation ;

It was further provided that such declaration might be made "unconditionally" or on "condition of reciprocity" or "for a certain time" or that in the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the court itself.<sup>1</sup> Up to the present date eighteen states have made such declarations. They are Brazil, Bulgaria, China, Costa Rica, Denmark, Finland, Haiti, Liberia, Lithuania, Luxembourg, the Netherlands, Norway, Panama, Portugal, Salvador, Sweden, Switzerland, and Uruguay. Unfortunately, among the number none of the great powers are to be found. But it is significant, and it affords evidence that sentiment in favor of the principle of compulsory jurisdiction is already widespread.

In addition to jurisdiction of controversies which the parties may submit to it and of jurisdiction of the abovementioned four classes of disputes which eighteen states have obligated themselves to submit to it, the permanent court has "compulsory" jurisdiction in a variety of disputes conferred upon it by various

<sup>1</sup> Apparently all the states which have agreed to recognize the court as having compulsory jurisdiction as among themselves have done so upon condition of reciprocity, that is, upon condition that in case of a dispute between two parties each accepts the obligation to recognize the court as having such jurisdiction. See examples of the declarations accepting compulsory jurisdiction in *Off. Jour. of the League* for October, 1921, pp. 807 ff.

treaties and conventions concluded since the close of the war. There are not less than 14 such treaties. Thus the treaties of peace between the allied and associated powers, on the one hand, and Germany, Austria-Hungary, and Bulgaria on the other confer upon the court jurisdiction over disputes arising under the clauses relating to ports, railways, and international labor conventions. Likewise, the treaties of peace with Austria, Hungary, Bulgaria, and Turkey give it jurisdiction of disputes arising under the clauses relating to the protection of racial, religious, and linguistic minorities. So the special treaties between the allied and associated powers and Czecho-Slovakia, Greece, Jugo-Slavia, Poland, Armenia, and Roumania for the protection of such minorities provide that in case any dispute arises concerning their rights, such dispute, if the complaining party demands, shall be referred to the permanent court. Various general conventions recently concluded also contain provisions for the reference of disputes either to the permanent court or to arbitral tribunals which may be the permanent court. Such are the conventions relating to the liquor traffic in Africa (Art. 8), the convention for the control of the trade in arms and ammunition (Art. 24), the convention revising the general Act of Berlin of Feb. 27, 1885 and the General Act and Declaration of Brussels of July 2, 1890 (Art. 72), all signed Sept. 10, 1919. By Article 38 of the International Air Convention, signed at Paris in September, 1919, it was provided that in case of disagreement between two or more states relating to the interpretation of the convention, the question in dispute should be determined by the permanent court. Finally, the statutes annexed to the conventions on freedom of transit (Art. 13) and on navigable waterways (Art. 22), both formulated by the Barcelona Conference of 1921 on communications and transit, give the court jurisdiction of certain disputes.<sup>1</sup> It thus appears that

<sup>1</sup> As to the jurisdiction conferred upon the Court by general and special treaties and conventions concluded since the close of the late



the court does in fact possess considerable compulsory jurisdiction and it is not improbable that in the enforcement of the treaties which confer it a good many disputes will arise and will be taken to the court for settlement. It is likely also that many treaties concluded in the future will give it jurisdiction, particularly of disputes relating to their interpretation. Finally, states which are parties to treaties of compulsory arbitration will in some cases no doubt prefer to utilize the court rather than organize *ad hoc* tribunals of arbitration.

It may also be remarked that in addition to its function of deciding international disputes submitted to it by states, the court is charged by Article 14 of the covenant with giving "advisory opinions" upon any dispute or question referred to it by the council or the assembly of the League of Nations. In all probability a good many such disputes and questions will be referred to the court. Various articles of the treaties of peace charge the League of Nations with deciding differences that may arise; some declare that certain disputes shall be settled "as provided by the League of Nations"; and others that they shall be decided by "tribunals instituted by the League of Nations."<sup>1</sup> In such cases it would be natural for the League to ask the permanent court for its opinion as to the legal questions involved or even refer the dispute to the court for final decision.<sup>2</sup> It is not improbable that, if the court had been in existence at the time, the dispute between Sweden and Finland concerning the Åland Islands and possibly also those relating to upper Silesia and Vilna would have been referred by the council to the court.

war, see Blociszewski, *De la Compétence de la Cour Permanente de Justice Internationale*, in 29 *Rev. Gén.* (1922), pp. 23 ff., where the particular treaty provisions are cited.

<sup>1</sup> See for example, Arts. 225, 289, 376, and 386 of the treaty with Germany; Art. 328 of the treaty with Austria; and Arts. 175 and 245 with Bulgaria.

<sup>2</sup> In fact Article 37 of the statute declares that whenever the existing treaties and conventions provide for the reference of any matter to a tribunal to be instituted by the League of Nations, the permanent court shall be such tribunal.

Questions relating to the competence of the League and of its various organs are certain to arise, as well as increasing numbers of international controversies falling within the jurisdiction of the League. In all such cases there will be at hand a court ready to give advice or to determine the disputes itself whenever it is called upon to do so.

Article 30 of the statute authorizes the court "to frame rules for regulating its procedure."<sup>1</sup> But the statute itself lays down a number of important rules governing the procedure of the court. It will be recalled that the convention of 1899 for the pacific settlement of international disputes contained a somewhat elaborate series of rules for the procedure of the permanent court of arbitration and the draft convention for the court of arbitral justice provided that the court should follow those rules of procedure, except in so far as the latter convention did not deal with the matter. The advisory committee of jurists in drawing up its proposed rules of procedure for the permanent court of justice drew upon the rules of 1899 and 1907 and also upon a project drafted in 1920 for the creation of a permanent court by representatives of Sweden, Denmark, Norway, Holland, and Switzerland.<sup>2</sup> Its proposed rules therefore represent in the main ideas already approved or in some measure already applied in practice by the Hague tribunals of arbitration. There is an obvious advantage in having definite rules of procedure for the court determined in advance instead of leaving the parties under the necessity of fixing them *ad hoc* by special *compromis* or leaving the Court itself to determine them after the case has been referred to it.<sup>3</sup> As to the language in which the proceedings shall be conducted the statute pronounces that it shall be French

<sup>1</sup> On the 29th of March, 1922, the Court adopted a body of rules governing its procedure. Some of the more important of them are explained by Judge Moore in 22 *Columbia Law Review*, pp. 507-09.

<sup>2</sup> Compare Scott, pamphlet cited, pp. 113-114.

<sup>3</sup> Compare Dennis on the necessity for an international code of arbitral procedure, in VII *Amer. Jour. of Int. Law*, pp. 285 ff.

or English but the parties may agree that the case shall be conducted in either and in the absence of an agreement each party may in the pleadings use the language which it prefers. It is also provided that the court may, at the request of the parties, authorize a language other than French or English. The advisory committee of jurists in its draft, however, unanimously recommended that French be made the language of the court, but with the right of the court, at the request of the parties, to authorize the use of another language.<sup>1</sup>

The procedure of the court consists of two parts : written or oral ; there will be cases and counter-cases and if necessary, replies ; witnesses, experts, agents, counsel, and advocates are to be heard. Service of notice on individuals shall be made through the governments of the states in which the notice is to be served. Hearings shall be public except where the court may otherwise decide or where the parties demand that the public shall be excluded. The presence of at least nine judges is necessary before the cases can proceed ; all questions shall be decided by a majority of the judges present ; the judgment is required to contain a statement of the reasons on which it is based ; dissenting judges are permitted to deliver a separate opinion ; the judgment is final and without appeal although application for the revision of a judgment may be made, if based upon the discovery of some fact of such a nature as to be a decisive factor and if it was unknown to the court and to the party demanding revision at the time the judgment was given.

The requirement that the court shall state the reasons upon which its judgments are based should serve an important purpose in developing a body of international jurisprudence and

<sup>1</sup> " The advisory committee was unanimous for French, without voting for any other tongue. They simply registered the fact that French is to-day the language of the polite world, of the diplomatic world, of international conferences, and, therefore, of the permanent court of international justice." Scott, *op. cit.*, p. 114.

this has been one of the chief advantages which the advocates of a permanent court have put forward in its behalf. Nevertheless, Article 59 of the statute would seem to stand in the way of the pushing of the doctrine of *stare decisis* to the limits to which it is sometimes carried in England and the United States. That article expressly declares that "the decision of the court has no binding force except between the parties and *in respect to that particular case*." This declaration is based on the possibility that a particular case between two parties may involve questions of international law affecting other states and that the latter should not be bound by the decision.<sup>1</sup> It also follows from this provision that the decision in one case will not be binding upon the court in subsequent analogous cases. But there is nothing to prevent the court from following the doctrine of *stare decisis* if it wishes and that it will do so may reasonably be assumed.<sup>2</sup> It is not likely, in any event, that the same judges who have decided a point of law in an earlier case will overrule it in a later case, except for weighty reasons that will seldom occur and there will always be a natural disposition on the part of the judges to show respect for and give great weight to the opinions of their predecessors. No court which should violate with impunity this universally recognized principle of judicial

<sup>1</sup> But Article 62 of the statute authorizes the court in such cases to allow other states to intervene as third parties. Thus there might be a case between Mexico and Switzerland involving an important question of maritime law of interest to Great Britain in which case the British government would be allowed to intervene as a party, otherwise the decision would not be binding on Great Britain. But manifestly the right of intervention by third parties will have to be limited, otherwise the sittings of the court may be interminable. Compare Richards, art. cited, p. 14.

<sup>2</sup> Compare Hudson, art. cited, p. 257, and Moore, art. cited, p. 510, who remarks that the qualification embodied in Article 59 is perhaps not so serious as might be supposed, since a certain weight is inevitably given to judicial decisions in all countries, whether they professedly accept or professedly reject the principle of *stare decisis* as an obligatory rule.

conduct could retain the public confidence for any great length of time.

The court, it may be added, is expressly charged by the statute (Art. 35) with applying :

- (1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States ;
- (2) International custom, as evidence of a general practice accepted by law ;
- (3) The general principles of law recognized by civilized nations ;
- (4) Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

And it is added : " This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto." <sup>1</sup>

Until the existing divergences of opinion and practice concerning what constitutes "international custom" and the "general principles of law recognized by civilized nations" have been removed by agreement, the court will necessarily be obliged sometimes to determine for itself what the law or custom is before it can apply the law. Otherwise it will be unable to decide the controversy. <sup>2</sup>

<sup>1</sup> There has been some controversy as to the precise import of the rule of *ex aequo et bono*. On the one hand, it has been held to vest the court with extra-judicial functions ; on the other hand, it has been suggested that as a decision based on the principle is neither extra-judicial nor non-judicial the purpose may have been merely to assure the ordinary application of legal rules. In any case it is to be hoped that it will not afford dissatisfied litigants an excuse for declining to abide by a decision because it was *ex aequo et bono*. Compare Moore, art. cited, p. 511.

<sup>2</sup> Lord Phillimore states that the advisory committee of jurists had "to fight some dangerous suggestions, that if there was no definite rule of law, the court should decide upon what it thought ought to be the

Naturally the service which the court will be able to render in the development of a body of international jurisprudence must depend in part upon the ability, the learning, and the impartiality of the judges and hence the degree of confidence which they are able to command throughout the world. In the creation of the present court every effort has been made to devise an organization and a method of election by which judges possessing these qualities and capable of commanding public confidence, has been made. In connection with the matter of eligibility to membership on the court, a question which occupied much of the time of the committee of jurists and which was the subject of prolonged discussion was whether judges possessing the same nationality as the litigating parties should be allowed to sit in a case in which their own country was a party. In the tribunals organized out of the old Hague tribunal of arbitration nationals of the litigating parties were chosen as arbitrators in 11 out of the 17 cases, 12 of the 32 arbitrators having in fact been nationals of the disputing countries. It was frequently urged that tribunals so constituted could not be absolutely impartial and that those who insisted that the parties should be represented in the tribunal by judges of their own nationality made the mistake of confusing the functions of a judge with those of an arbitrator. But the prejudice in favor of the system was too strong to be overcome and the draft of the committee of jurists as well as the statute of the court as finally adopted provided that "judges of the nationality of each contesting party shall retain the right to sit in the case before the court."<sup>1</sup> The further question arose as to what should be done in case one of the parties was represented on

law." To meet this danger the sources of law were enumerated in Art. 35. See his article cited, VI *Grot. Soc. Transactions*, p. 94. But as stated above, the court will still be obliged to determine what is "international custom" and what are the "general principles of law recognized by civilized nations," whenever there are differences of opinion, or decline to render a decision.

<sup>1</sup> Art. 28 of the committee's draft; Art. 31 of the statute.

the court by a judge of its nationality, while the other was not. The Convention of 1907 for the establishment of an international prize court had provided that the large powers should always be represented on the court and that if a belligerent power was unrepresented by a judge of its own nationality at the time of trial, it might demand that the judge appointed by it should be allowed to sit.<sup>1</sup> The draft convention of 1907 for the establishment of a court of arbitral justice did not contain such a provision for the reason that the conference failed to reach an agreement as to the mode of selecting the judges. Had such an agreement been reached it is quite certain that the convention would have contained a provision of this kind.<sup>2</sup> The committee of jurists which drafted the project for the creation of the permanent court of justice in 1920 recommended that if the court included upon the bench a judge of the nationality of one of the parties only, the other party should be allowed to select from among the deputy judges a judge of its own nationality and in case there were none such among the deputy judges it might choose a judge preferably from among those persons who had been nominated as candidates. The recommendation was approved by the assembly and the council of the League and was incorporated in the statute of the court.<sup>3</sup> The participation of judges representing

<sup>1</sup> Arts. 15 and 16.

<sup>2</sup> In fact a draft convention concluded in March, 1910, by representatives of Germany, France, Great Britain and the United States for putting into effect the convention of 1907 for the establishment of the court of arbitral justice provided that each party should be represented by a judge of its own nationality, in the cases before the court.

<sup>3</sup> Article 31. Lord Phillimore (art. cited, p. 91) defends the solution reached. One or two "utopian members," he says, "favored the elimination of the national judge in case one party was represented by a judge of his own country and the other not, but that he and a majority of the committee felt that this was "too exalted a standard." The Japanese member, he says, felt strongly that if Japan were a party to a case and the Japanese member were eliminated there would be no judge on the Court who would appreciate the Japanese point of view. Among the "utopian members" referred to by Lord Phillimore was Mr. Fer-

the parties may, in appearance at least, detract from the impartiality of the court, but inasmuch as not more than two of the eleven judges are likely to be nationals of the litigating parties and since decisions must be made by a majority vote, it hardly seems probable that the participation of one or two such judges in the case will have any decisive effect upon the judgment. It is quite clear that the participation in the hearing and decision by judges of the nationality of the parties will increase the confidence of some states in the court and that some of them would hesitate to submit their controversies to it and take them, instead, to the Hague tribunal of arbitration, if there were no judges of their own nationality sitting in the cases in which they were parties. At all events, the system adopted is much less objectionable than that of the Hague arbitration tribunal which is usually more largely composed of judges representing the nationality of the parties and which for that reason is less likely to be impartial.

Finally, it may be remarked that the statute for the creation of the permanent court contains no provision for the enforcement of its judgments. The committee of jurists which drafted the plan of the court, did not, we are told, overlook the matter. But after due consideration it reached the conclusion that the duty of the court was fulfilled when it had found the facts in the case before it and had applied the rules of law to the facts as thus found.<sup>1</sup> The only "sanctions" therefore are those found in the covenant, article 13 of which binds the members to "carry out in good faith any award that may be rendered." It also adds that, "in the event of any failure to carry out such an award, the council shall propose what steps should be taken to give effect thereto." In case the power of public opinion and the honor and good faith of the parties prove to be an

nandes, who made a strong argument in favor of the elimination of national judges. The matter is fully discussed by Morellet, *op. cit.*, pp. 99 ff.

<sup>1</sup> Scott, *op. cit.*, p. 133.



insufficient sanction, there remains as a last resort the means of coercion which the covenant places in the hands of the organs of the League. Happily, the scrupulous respect for arbitral awards in the past justifies the belief that the use of coercion to enforce the decisions of the court will rarely if ever be necessary.

Such is the permanent court of international justice which was formally opened at the Hague in January, 1922, the first of its kind in the history of the world. Brought into existence through the initiative of the League of Nations, its judges elected by the two representative organs of the League and paid out of the treasury of the League, it is not, strictly speaking, the judicial organ of the League since it is open to states which are not members of it. Once created it functions independently of the control of the League. At present 45 states have signed the protocol for membership in the Court and of these 33 have ratified it in accordance with the requirements.<sup>1</sup> The only important powers which have not yet ratified are the United States Germany, Russia, Chile, and Argentina ; <sup>2</sup> of these Germany and Russia have not yet been invited ; the others will in all probability become members sooner or later. Eventually therefore it will become in the full sense a world court.

When it opened its doors for business on June 15, 1922, there were no cases on the docket. But it is well to remember that some great national courts began their careers with no cases

<sup>1</sup> They are the following : Albania, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Cuba, Czecho-slovakia, Denmark, Finland, France, Great Britain, Greece, Haiti, India, Italy, Japan, Netherlands, New Zealand, Norway, Poland, Portugal, Rumania, the Serb-Croat-Slovene State, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay and Venezuela.

<sup>2</sup> In May, 1922, the Council of the League decided that Russia, Germany, Turkey, and Mexico, none of which have been admitted to membership in the League, would be allowed to bring their cases before the court provided they agreed in advance to accept its decisions and to refrain from declaring war over the disputes in question.

to occupy their attention. The United States Supreme Court at its first meeting in February, 1790, had no cases on its docket and it was not until its seventh meeting in February, 1793, that it was called upon to decide an important case. Lack of cases during its first years, therefore, affords no basis for prophecy as to the future possibilities and usefulness of the court.<sup>1</sup> The really important fact is that there now exists for the first time an international court composed of jurists of the highest moral and professional standing, fully organised and ready to hear cases that may be laid before it.

If the results are disappointing, it will hardly be due to the character of the court but to the unwillingness of states to carry their controversies to it for decision. Its future therefore must depend upon the development of a public sentiment which will induce governments to have recourse to it for the settlement of their disputes rather than to force and violence.

<sup>1</sup> On the other hand, as Judge Moore remarks, the lack of cases on the part of the U. S. Supreme Court in the beginning does not afford a sure basis of forecast for the International Court because, the jurisdiction of the former court being largely appellate, there could hardly have been any cases at the outset. The International Court, on the other hand, is not an appellate tribunal and it has jurisdiction only of such original cases as states may choose to carry to it.

## LECTURE XIV

### Progress of Codification

The most significant development in international law during the past century, perhaps, has been its steady transformation from a mass of custom, practice and judicial precedent into a body of written law, formulated, in the main, by international congresses or conferences and embodied in the texts of multi-lateral conventions, acts or declarations which have been ratified or acceded to by the whole body of states or most of them.

Thus by the side of the customary law there has grown up, bit by bit, a large body of conventional law consisting of definite written rules, many of which, to be sure, are merely declaratory of pre-existing customs and practices but many of which also consist of new rules or of innovations upon former usages. In consequence, the existing system of international law forms a striking contrast to that of a century ago when the law was almost wholly customary. A large part of the law, especially that which has to do with the relations of states in time of peace, is still customary and in this respect it is somewhat analogous to the common municipal law of England and the United States, but the proportion of conventional law is steadily increasing and, as a consequence, the former rôle of custom is becoming less and less preponderant. The transformation has been distinctly beneficial. Much of what was formerly uncertain and indefinite has been given the character of precision and definiteness; divergencies of interpretation and practice have been harmonized; the occasions for controversy have been correspondingly reduced and international law has tended more and more to acquire the characteristics of municipal law.

The principal question which remains to be considered is whether the progress thus achieved cannot and should not be

carried still further, that is, whether the rules of law now found in a multiplicity of international conventions, acts and declarations, together with those which are still unwritten but which have received the sanction of practice and of judicial authority cannot be collected and reduced to a single harmonious system or body as the municipal law of many states has been. And whether also the process may not be pushed further than the mere codification of the rules concerning which there is now a general agreement, so as to embrace the larger task of reaching an agreement upon many important matters concerning which there is still a divergence of opinion and practice among states. Finally, it is desirable to go still further and supplement the existing body of law by new legislation dealing with a variety of situations and relationships to which recent inventions and changed conditions of international life have given rise, but for the regulation of which there is as yet no law. This is the problem of codification in the larger sense of the term. Its task is to assemble, systematize, and reduce to coherent form the existing rules of international law, both customary and conventional, to remove the divergencies of opinion and practice which still exist and to provide new rules of law to cover domains now legally unregulated. Is such an undertaking desirable and if so, is it practicable? There is now and always has been a difference of opinion among jurists and text writers regarding both the desirability and the practicability of the task, though in late years the preponderance of opinion has become more and more pronounced in favor of codification. The controversy therefore rages mainly over the question of practicability and the degree to which the process of codification should be carried.

Since the end of the eighteenth century, codification of international law in some sense or other has had its partisans and the number has increased steadily with the development and increasing importance of the law, resulting from the complex conditions of modern international life. Jeremy Bentham, who

gave international law the name by which it is now generally known, at various times during the latter part of the 18th century and the early years of the 19th century advocated its codification and drew up himself the plan of a proposed code, which, however, was mainly a statement of the rights and duties of sovereigns towards one another. His project contemplated a universal code and a particular code for each state.<sup>1</sup> Bentham's work, however, was little more than the outline of a plan and not at all a draft such as those of Bluntschli, Field, Fiore and others in more recent times.

It was not unnatural that the idea of formulating a statement of the rights and duties of nations should have commended itself to the French revolutionists. Having adopted a declaration of the rights of man the convention proposed to supplement it with a declaration of the rights of nations, and in June, 1793, the Abbé Gregoire presented to the assembly a draft in 21 articles of such a declaration and followed it up with a discourse in which he declared that the public conventional law of Europe was "an incoherent and bizarre assemblage of good and bad usages." His proposed declaration was not, however, a code in any real sense but merely a brief enumeration of certain general principles or maxims concerning the rights and duties of nations.<sup>2</sup> It was unacceptable to the convention for the reason, as alleged by Gregoire, that the committee of public safety felt that the principles which it proclaimed would irritate the despots with whom it was intended to enter into negotiations. The idea of Bentham

<sup>1</sup> As to the history and details of Bentham's project see Nys in 5 *Amer. Journal*, pp. 876 ff.; also his *Le Droit International*, I, 169 ff. See also *Procs. Am. Soc. of Int. Law*, 1910, pp. 214 ff., and Wheaton, *History of the Modern Law of Nations*, p. 328 ff.

<sup>2</sup> English text in *Procs. Amer. Soc. of Int. Law*, 1910, pp. 226-227; French text in Nys, *Etudes de Droit Int. et de Droit Politique*, pp. 393-4. M. Nys reviews the history of the Abbé Gregoire's project in his *Etudes*, pp. 394-406, and in the *Amer. Journal*, Vol. V, pp. 892-893. See also Martens, *Précis*, pp. 9-21, and Rivier, *Droit des Gens*, Vol. I, pp. 40-41.

that it was both desirable and practicable to reduce the whole body of international law to the form of a code found a goodly number of advocates in the nineteenth century. In England, James Mill, influenced by Bentham, proposed that the preparation of a code of international law be entrusted to a body of delegates representing the different nations, though he did not himself suggest a plan or point out the difficulties to be overcome. A little later Frederick Seebohm published a book on the *Reform of the Law of Nations* in which he advocated the adoption of an international code. In 1851 an Italian jurist, Parodo, published a project of a code of international private law in 555 articles, which dealt also with such matters as maritime law, the principles of diplomacy, and sanitary affairs.<sup>1</sup> Between 1858 and 1862 the Russian jurist, Katchenovsky, read before the Juridical Society of London two memoirs on the state of international law in which he insisted upon the desirability of codification, the same to be undertaken by jurists representing all countries.<sup>2</sup> In 1861 an Austrian jurist, named Domin-Petrushevecz, published the project of a code in 236 articles,<sup>3</sup> preceded by an introduction, in which he explained his method. It dealt with both public and private international law and was conceived in a strictly juridical spirit and written in a clear style. It represented an attempt to state the customary rules of international law as well as to summarize the common principles which were found in the great body of contemporary treaties. Domin-Petrushevecz says he was impressed by the fact that even in his day there was only a very small part of international law which had not been dealt with in some degree by numerous conventions between different states. In considering and

<sup>1</sup> It was entitled *Saggio di Codificazione del Diritto Internazionale*, (Turin).

<sup>2</sup> Nys, *Le Droit Int.*, Vol. I, p. 174.

<sup>3</sup> It was entitled *Précis d'un Code de Droit International* (Leipzig). See Roszkowski, *De la Codification du Droit Int.*, in 21 *Revue de Dr. Int.*, p. 523.

comparing these conventions, he added, one found with the greatest satisfaction that they contained not only principles often uniform but that they were often expressed in identical terms. It was only in the domain of maritime law that there existed a striking diversity of opinion, due to the unequal distribution of forces and to the actual preponderance of certain states, resulting therefrom. But even as to these diversities there was an increasing tendency among states to make reciprocal concessions and to reach an agreement upon common rules. He concluded, therefore, that it was possible to formulate a code of common rules for the regulation of the relations between states which would be acceptable to them all. Such a code could be prepared by an international commission which should select the common rules found in the various conventions in force, as well as those which by the almost unanimous opinion of text writers and of governments had come to be regarded as the common law of nations. The commission, he urged, should avoid all attempt to deal with political questions such as intervention, balance of power, etc.; it should endeavor by mutual concessions to reconcile divergencies of opinion and should embody the conclusions arrived at, in the form of a universal code to be adopted by all the states and promulgated in their respective countries.<sup>1</sup>

A little later the renowned German-Swiss jurist, Bluntschli, undertook the somewhat more ambitious task of drafting a complete code of international law.<sup>2</sup> Bluntschli was a scholar of vast erudition, a publicist, philosopher, historian and jurist. His *project* consists of 862 articles preceded by an elaborate introduction in which he discussed the nature, objects, and basis

<sup>1</sup> See the analysis and comment in Nys, *Le Droit International*, Vol. I, pp. 178-179.

<sup>2</sup> It was published in German in 1868 under the title *Das Moderne Völkerrecht der Civilisirten Staaten als Rechtsbuch dargestellt*. It has been translated into French by Monsieur C. Lardy and published under the title *Le Droit International Codifié* (Paris, 1886).

of international law as well as the general plan of his code. The code proper is divided into three general parts : the law of peace, the law of war and the law of neutrality and each part is subdivided into books, sections and articles. Bluntchli's project was by far the most comprehensive of the attempts at codification which had been made ; it served as the basis of various subsequent projects and it demonstrated the possibility of stating the great body of the rules of international law in clear and precise terms. It has been criticised on the ground that it was not limited to a statement of the existing rules of positive law but included, in addition, a number of scientific postulates and personal opinions of the author in regard to controverted questions. On account of the resulting confusion it is not always easy to distinguish between the rules of law as such and the rules which are not law and which therefore are not binding. Moreover, the arrangement and style have been criticized as has also the tendency of the author to throw in explanations, definitions, and doctrinal observations which are out of place in a code of law.<sup>1</sup>

Four years later (1872) an American jurist, David Dudley Field, who had already performed important services in connection with the codification of the law of the State of New York, published his *Draft Outlines of an International Code* in 1,008 articles. The author had the advantage over Bluntschli of being an eminent jurist engaged in the actual practice of his profession and was therefore less theoretical in his method and point of view. His *Draft*, unlike Bluntschli's and still more unlike those of Bluntschli's predecessors, was limited to a statement of the rules of international law that were actually accepted and regarded as being in force. The articles, however, were supplemented by ample annotations explaining them not only in the light of reason but also from the point of view of diplomatic practice. His project embraced in a fairly comprehensive manner the

<sup>1</sup> See the remarks of Roszkowski in 21 *Revue de Droit Int.*, p. 523.



whole field of international law, emphasizing especially the law as it was accepted and applied by the United States. This overemphasis of the American view and practice was in the minds of some authorities its principal defect.<sup>1</sup>

A still more recent and elaborate individual essay at codification was that of the well known Italian jurist, Fiore, published in 1890.<sup>2</sup> It is a work of 1,895 articles, preceded by an introduction consisting of five chapters dealing with the organization of international society, the purpose of international law, its formulation and enforcement, etc. The code proper is subdivided into four books dealing with persons and things, international obligations, property as an object of international law and its sanctions, and these are arranged in twenty-three chapters. He thus states the purpose and scope of his work: "Accordingly, we purpose to set forth international law, taking into account the existing law and such rules as may be capable of becoming law. In other words, we intend systematically to formulate the body of rules which consist in part of those accepted by states in general treaties, in their legislation or in diplomatic documents, and, in part, of those rules found either in the popular convictions which have manifested themselves in our time, or in the common thought of scholars and the most learned jurists. As a natural consequence, the rules systematically assembled in the present volume represent, in part, present international law, and in part, the international law of the future. As a whole, it comprises the system which, in our opinion, is calculated to endow international society with a legal organization." His book is not therefore a code of existing international law, as Bluntschli's, and still more, Field's drafts were intended to be, but rather a body of proposed rules which should be adopted as governing the relations of

<sup>1</sup> This is the criticism of Roszkowski, art. cited, p. 524.

<sup>2</sup> It is entitled *Il Diritto Internazionale e la sua Sanzione Giuridica*, 4th edition, 1911. An English translation under the title *International Law Codified*, by E. M. Borchard, was published at New York in 1918.

states. It was not even intended by the author to be a project of an international code proposed to governments for adoption by them in its entirety. His own view was, in fact, that the idea of codifying at once the whole body of international law was impracticable because the different governments could never be induced to agree immediately upon a complete code of rules.<sup>1</sup> Fiore's eminence as a jurist and his high reputation gave his proposals and recommendations a weight which those of some of his less distinguished precursors never commanded. He tells us that the sources from which he drew his proposed rules were international conventions, which constitute the most important source of positive international law; the proceedings of international congresses; the declarations of the representatives of governments participating in such congresses; bilateral treaties when a large number have been concluded between states and containing common provisions; municipal legislation, such as military and naval codes; diplomatic acts of different states; custom; and the opinions of text writers of authority. From these extensive and varied sources and from his own reason and experience he drew the materials out of which he elaborated what is undoubtedly the best reasoned, the most modern and the most authoritative of all the projects by which it has been attempted to reduce the law of nations to a body of definite written rules. Several other recent projects of codes may be mentioned. The more important are Duplessix's *La Loi des Nations* (1906),<sup>2</sup> Pessoa's *Projecto deCodigo*

<sup>1</sup> See his statement in Borchard's translation, p. 79.

<sup>2</sup> Duplessix's work consists of a project of an international treaty in 116 articles for the organization of a union of the civilized states of the world with legislative, executive and judicial organs and the project of a code of international public law, in 786 articles. One reason, he thinks, why former projects have had no greater success is to be found in the fact that they were prepared at times when international law was going through an active period of transformation and consequently the attempt to reduce the law to the form of a code was not regarded with favor. Furthermore, some of the authors of the projects made the mistake of not confining their codes to a statement of the existing rules

*de Diritto International Publico* (1911), and Klein's *Codified Manual of International Public and Private Law* (in Swedish, 1911). The last and most recent undertaking by an individual jurist to recast and restate in the form of a code the rules of international law is *The New Code of International Law* by a Canadian jurist, Jerome Internoscia, published in 1910 in English, French and Italian. It is by far the most elaborate project of the kind that has been published. It embraces what the author considers to be the rules of both public and private international law, arranged in 5,657 articles, and is preceded by an extended introduction. The author tells us that "the law, as it is, is inadequate; needs recasting; it is eaten by its own rust; at certain places it reaches the ideal, at others it falls far short of common sense." He therefore attempts to present a more or less complete code dealing with all possible relations between states as well as those between states and individuals, with a view to removing the causes of war. One of his principal objects, he tells us, is to encourage nations to abandon particular habits and customs which no longer have any *raison d'être* and to adopt uniform rules. Two-thirds of his code, we are told, consists of rules found in books on international law published during the last two or three generations. The rest, while not found in the books, is yet not altogether new to modern minds; in fact, it is "something felt by almost every heart beating in this twentieth century, something which, if expressed in one phrase, might be said to be a *longing for universal peace*." The author cherishes the belief that if all the civilized states would accept a common code regulating all their common relations and would then establish a supreme magistrature for applying it, we should hear no more of war. One cannot but

of law but too often interjected their own opinions as to what the law should be. In his own project he refrained from encumbering the text with numerous explanatory notes and from introducing his own personal opinions. See his *La Loi des Nations*, pp. 20-23.

admire the high purposes of the author and his work bears evidence of extensive industry but after all it is only a private undertaking and like other similar projects in the past it remains only the proposal of an ambitious jurist.

Such are the more important attempts by individual jurists to re-state the rules of international law in the form of a code. They by no means exhaust the list; many other less ambitious and less noteworthy attempts and proposals have been made.<sup>1</sup> Most of them were, in form, less real codes capable of being used by states than treatises on international law divided into articles and containing *résumés* of the principles which in the opinion of the authors ought to be made a part of the body of international law. It cannot be said that they have been entirely without result even if none of them have been adopted in whole or in part by states. They have demonstrated in some degree the possibilities of codification; have called attention to the advantages of a re-statement of the law in the form of written rules and at the same time have revealed something of the difficulties and the nature of the task which codification involves.

Interest in the movement for codification has by no means been confined to individual jurists and text writers. It has also occupied the attention of various learned societies and organizations for the promotion of the study of legal science, the reform of the law and the advancement of peace. Among these societies may be mentioned the British Association for the Promotion of Social Science, the Juridical Society of London, the English Association for the Reform and Codification of the Law of Nations, founded in 1873 (its name was

<sup>1</sup> A more complete list of the projects that have been prepared or proposed since the French Revolution may be found in the article by Roszkowski cited above, pp. 521 ff. See also Nys, I, 178 ff., and his article on the Codification of International Law in 5 *Amer. Four.*, pp. 878 ff. See also Alvarez, *La Codification du Droit International*, pp. 224 ff.

changed to the International Law Association in 1895), the Institute of International Law, founded at Ghent in the same year, the Universal Peace Congress, the American Society for the Judicial Settlement of International Disputes, the Inter-parliamentary Union, and the various Pan-American Congresses. It was to the Juridical Society of London that Katchenovsky in 1858 and 1862 made his proposal for codification, already referred to, and it was the British Association for the Promotion of Social Science which, upon the request of David Dudley Field in 1866, appointed a committee to prepare the outlines of an international law code. One of the principal objects of the British Association for the Reform and Codification of the Law of Nations, as its name indicates, was to promote the movement for codification and while it has continued to advocate codification it has done little or nothing in a constructive way to advance the cause. The Universal Peace Congress, at its meeting at Stockholm in 1910, considered the project of a code of public international law presented by M. Arnault and appointed a committee to examine it with a view to submitting a definitive draft to the various governments, to serve as one of the bases of the work of the commission charged with the preparatory studies for the third Hague Conference. The Inter-parliamentary Union, at its session at Christiania in 1899 charged its council with the preparation of the project of a code determining the rights and duties of states; at its London meeting in 1906 it expressed itself in favor of the codification of the law of nations through the agency of an international commission to be appointed by the Second Hague Conference and at its meeting at Berlin in 1908 it expressed a desire that the third Hague Conference should give its attention to the matter by extending the work already accomplished at the second conference.<sup>1</sup> Of the

<sup>1</sup> The American Society of International Law, founded in 1907, has taken some interest in the question of codification. At its meeting in 1909 it appointed a committee on "the codification of the principles

above-mentioned societies, the one which has rendered the most constructive service to the cause of codification has been the Institute of International Law. Article 1 of its constitution declares its object to be the promotion of the growth of international law, among other ways, by "giving assistance to every serious attempt at the gradual and progressive codification of international law" and by "advocating the official acceptance of those principles that have been recognized as being in harmony with the needs of modern societies." Its activity has not been limited merely to expressions of interest in and sympathy for the movement but it has itself done much to demonstrate both the practicability and desirability of codification. Among the more important projects of codes which it has adopted may be mentioned the following: draft regulations for international arbitral procedure in twenty-seven articles (1875)<sup>1</sup>; draft of a manual of the laws and customs of war on land, in seventy-eight articles (1880)<sup>2</sup>; draft of international regulations for the navigation of rivers, in forty articles (1887)<sup>3</sup>; a draft of international regulations on the admission and expulsion of aliens, in forty-one articles (1892)<sup>4</sup>; a draft of regulations concerning the status of ships and their crews in foreign ports in time of peace and in time of war, in forty-six articles (1898)<sup>5</sup>; and the draft of a manual of naval war governing the relations between belligerents, in 116 articles

of justice in times of peace between nations," and at its annual meeting the following year reports of two sub-committees were received: one upon the scope and plan of codification and one on the history and status of codification. The text of these reports may be found in the proceedings of the Society for 1910, pp. 197 ff. At the meeting of 1911 reports were presented on the primary sources of obligations, on the value of authorities and on a plan of codification. Proceedings, 1911, pp. 257 ff.

<sup>1</sup> Text in *Annuaire de l'Institut de Droit International*, Vol. I, p. 126.

<sup>2</sup> *Ibid*, Vol. V, pp. 157 ff.

<sup>3</sup> *Ibid*, Vol. IX, pp. 182 ff.

<sup>4</sup> *Ibid*, Vol. XII, pp. 218 ff.

<sup>5</sup> *Ibid*, Vol. XVII, pp. 273 ff.

(1913).<sup>1</sup> In addition to these more pretentious projects the Institute has prepared and approved less comprehensive drafts of regulations dealing with a great variety of questions of international law, concerning which there is more or less divergence of opinion and practice or which are in part unregulated by custom or convention. Among these may be mentioned the drafts dealing with extradition, marine insurance, pacific blockade, collisions at sea, definition and status of the marginal sea, diplomatic and consular immunities, bombardment by naval forces, nationality and expatriation, emigration, responsibility of states for damages sustained by aliens in case of riot, insurrection or civil war, treatment of submarine cables in time of war, submarine mines, wireless telegraphy, aircraft, and the effect of war on treaties. Several of the projects referred to in the first of the above mentioned groups are fairly comprehensive and approximate in some degree the character of real codes. This is particularly true of the manuals of land and naval warfare adopted in 1880 and 1913, respectively. Both were the subjects of reports and of thorough discussion by committees and of the Institute as a whole at several meetings and this may in fact be said of most of the drafts which have received its approval. In the preface to the manual of land warfare the Institute modestly disclaimed any intention of proposing its adoption to the various governments through the form of an international treaty but contented itself with saying that the manual was simply offered by way of suggestion as a suitable basis for national legislation in each state and in accord with both the progress of juridical science and the needs of civilized armies. It also added that in the preparation of the manual it endeavored to avoid innovations but sought merely to state clearly in the form of a code the "accepted ideas of our age so far as this has appeared allowable and practicable." Professor Holland praises the manual as being a

good example of what may be done in the way of codification by "collective scientific action" and as preparing the way for a generally accepted written law of war. And he adds: it has at least called the attention of the various governments to the duty of promulgating authoritative instructions upon the subject for the use of their armies.<sup>1</sup> This project, like the others that have emanated from the Institute, is a model of conciseness, of clearness and of style; it is singularly free from impracticable and purely idealistic theories and in so far as some of its rules may be said to go beyond the existing law as it is generally accepted they represent the more liberal tendencies and the best juristic opinion of the day.<sup>2</sup> By reason of these facts and the very high reputation of the jurists who compose the membership of the Institute, its drafts, although the work of an entirely unofficial body, have enjoyed a very high authority

<sup>1</sup> *Studies in International Law*, p. 95.

<sup>2</sup> The history of the preparation of the manual of 1880 and the mode of procedure followed are detailed by Professor Holland in his work referred to, pp. 89 ff. The manual consists of 86 articles and is divided into three parts; in the first part the general principles are laid down; the second part applies them in detail, and the third relates to the punishment which the laws of each country ought to prescribe for violations of them. The Naval Manual of 1913 is a somewhat more elaborate and detailed code of 116 articles. It deals with such matters as the conversion of public and private vessels into warships, means of injuring the enemy, use of torpedoes and mines, bombardment, the right of capture, transfers of flag, postal correspondence, cables, prisoners, treatment of the shipwrecked and wounded, search and seizure, and destruction of prizes. The Manual embodies many of the rules of the Hague Conventions and the Declaration of London. Although standing by its earlier decision in favor of the abolition of the capture and confiscation of enemy private property at sea, the Institute, recognizing that the principle was not yet conceded, admits in its manual the right of a belligerent to capture and confiscate the private ships and goods of the enemy (Art. 33). It settles in the negative the controverted question of the right of conversion of vessels into warships on the high seas (Art. 9); it forbids the laying of automatic contact mines in the open seas (Art. 20); and it imposes upon belligerents an obligation to make compensation for the seizure or destruction of cables connecting belligerent with neutral territory (Art. 54). The history of the preparation of the Institute Naval code is detailed in the *Annuaire de l'Institut*, Vol. 25, pp. 41 ff. The second Hague Conference having expressed the



among governments,<sup>1</sup> in international conferences and with arbitral tribunals and national courts. No one of its projects has yet received the approval of the governments of the world by being formally adopted but they have exerted an important influence upon international conferences which have followed. Mr. Elihu Root has remarked that its work made possible the success of the two Hague Conferences, since it furnished the carefully and thoroughly prepared materials and conclusions which served as the basis for the decisions of the conferences.<sup>2</sup> "Even a hurried and cursory examination of the reports of the Hague Conferences explaining and interpreting the different conventions shows the influence of the Institute upon the deliberations of this august international assembly. Reference is made, without quoting, to the reports on the questions of the opening of hostilities, contraband of war, automatic submarine contact mines, inviolability of correspondence, and very especially to the report of the most distinguished of all international reporters, on the convention relative to the creation of an international prize court, which it is hardly necessary to say was prepared by Louis Renault."<sup>3</sup>

The Institute has not yet undertaken the ambitious task essayed by Field, Bluntschli, Fiore and others, of preparing a

*voeu* that the preparation of a *règlement* relative to the laws and customs of maritime war should be taken up by third conference, the Institute appointed in 1910 a commission of 9 members to prepare a draft following the general lines of its code of 1880 relative to the laws and customs of land warfare.

<sup>1</sup> As illustrating the weight which the American government attaches to the projects adopted by the Institute attention may be called to the fact that the rules of the Institute Naval Manual of 1913 relative to the laying of automatic contact mines are inserted in footnotes in the United States Rules of Land Warfare issued by the War Department in 1914 (see pp. 149-150). It is stated in the preface to the American Manual that in view of the incomplete and unsatisfactory state of the law relating to submarine mines as stated in the Hague Convention "it was deemed prudent to incorporate in the footnotes the rules of the Institute."

<sup>2</sup> Address on Francis Lieber, 7 *Amer. Jour.*, p. 453.

<sup>3</sup> Scott, preface to *Resolutions of the Institute of International Law*, p. ix.

complete code of the whole body of law ; it has preferred the more modest rôle of codification by piecemeal. Its methods have been in accord with the best opinion as to the mode of procedure that should be followed in the work of codification. It has limited itself to special fields of international law ; committees have been appointed to study and report on the particular matter selected and the reports have been the subject of extended discussion, of reflection and often of reconsideration. Altogether it may be said that the Institute has shown the way by which codification may be best achieved and at the same time revealed its possibilities, in a degree not yet demonstrated by any other organization or body.

From the activities of individuals and associations we may now turn to those of governments acting either singly and alone or in concert. What has sometimes been called the initiative in this direction was the preparation and promulgation in 1863 by the government of the United States of Francis Lieber's "Instructions for the Government of the Armies of the United States in the Field." At the time, a great civil war was raging in the United States ; large armies, composed for the most part of untrained volunteers and commanded often by officers who lacked familiarity with the established customary rules of war, had been put in the field ; many questions concerning the rights and duties of commanders as well as those of both combatants and non-combatants were constantly arising and not infrequently conflicting decisions were being made by commanders in different fields, sometimes resulting in great harm before they could be reversed by the competent authority.<sup>1</sup> Under these circumstances the need of a body of written rules defining the rights and duties of commanders as well as those of the inhabitants, soon became manifest. It was to provide this need that President Lincoln charged Francis Lieber, a

<sup>1</sup> See my work on *International Law and the World War*, Vol. I, p. 2, and an article by General Geo. W. Davis in 1 *Amer. Jour.*, p. 13.

distinguished German-American scholar who in early life had sought refuge in America from the oppression of his own land, with the preparation of a body of rules for the guidance of the military commanders and troops. The "instructions" prepared by Lieber were revised by a board of army officers and after receiving the approval of the President were issued as general order No. 100. They were distributed to the armies and were rigorously enforced.<sup>1</sup> In arrangement and content the "instructions" consisted of ten sections subdivided into 157 articles, containing more or less detailed provisions in regard to martial law and military jurisdiction, the rights of non-combatants, the status of enemy property, the treatment of prisoners and hostages, lawful and unlawful methods of war, the various kinds of lawful combatants, spies, traitors, flags of truce, parole, armistices, capitulations, etc. They constituted, as Bluntschli observes, the first code of the laws of land warfare; they received merited praise from international jurists and they exerted an important influence upon the subsequent development of international law. "From the beginning to the end," says Bluntschli, "they contained general rules relative to international law in its *ensemble*; the form in which they were expressed corresponded with the existing ideas of humanity and the manner in which civilized peoples make war; their influence extended far beyond the boundaries of the United States; and they contributed powerfully to fix the principles of the law of war."<sup>2</sup> "Thus it was to the United States and to Lincoln," says Martens, "that the honor belongs of having taken the initiative to define and determine with precision the laws and usages of war."<sup>3</sup>

<sup>1</sup> Davis, *Elements of International Law*, 3rd ed., pp. 499-500.

<sup>2</sup> *Droit Int. Codifié* (tr. by Lardy), p. 6.

<sup>3</sup> *La Paix et la Guerre* (tr. by de Lance) p. 77. Compare also Merignhac, *Les Lois et Coutumes de la Guerre sur Terre*, p. 21, and Alvarez (*La Codification du Droit International*, p. 225) who remarks that they represented the first serious attempt at codification of that part of international law relative to the laws and customs of war on land and that they exerted a great influence not only upon the governments

Whatever may have been their defects, says the late Professor Renault, "they rendered a great service by demonstrating the possibility of subjecting the conduct of armies to definite written rules.<sup>1</sup> They influenced other governments to follow the example of the United States; they became the basis of the *projet* adopted by the Brussels Conference in 1874 and exerted an important influence upon the decisions of the Hague Conferences of 1899 and 1907. They remained in force until 1914 when they were superseded by a new manual entitled "Rules of Land Warfare" issued by the Secretary of War on April 25.<sup>2</sup> The new "Rules" constitute a more elaborate code, the 157 articles of Lieber's "instructions" having been expanded into 443 articles, but "everything vital" contained in the "instructions" of 1863, we are told, has been incorporated in the manual of 1914. Certain obsolete provisions such as those relating to slavery were omitted but the rules of the great international conventions of Geneva and the Hague are inserted in their proper places in the new manual. It is enriched by the insertion of many explanatory notes, quotations from manuals issued by other governments, from the opinions of text writers of authority, and from judicial decisions, and references to the practice in recent wars. Finally, there is an abundance of illustrative material in the form of appendices. The manual is a work of very great merit, it is carefully prepared, well

of different countries but upon the international conferences which followed, notably those at Brussels in 1874 and at the Hague in 1889 and 1907. They are highly praised by Nys (34 *Rev. de Droit Int. Pub.*, pp. 683 ff.) who remarks that they were characterized by generous conceptions and humane sentiments and exerted great influence. Professor Holland criticizes them as being, perhaps, unnecessarily long and minute as not being well arranged and as certainly being more severe than the rules which would be generally enforced in a war between two independent states. *Studies in International Law*, p. 85. But Holland approves the general idea and recognizes the manifest advantages of issuing rules of this kind.

<sup>1</sup> Address, 1914, on "War and the Law of Nations," 9 *Amer. Jour.*, p. 2.

<sup>2</sup> Published by the Government Printing Office, Washington, 1914.

arranged and is altogether probably the best example of a code of the laws of land warfare that has been issued by any government.

As Bluntschli remarks, the European states could not remain behind the United States in this movement without disregarding public opinion and without exposing themselves to the accusation of not keeping pace with the progress of international law throughout the civilized world.<sup>1</sup> In fact the American example was soon followed by the action of various governments of continental Europe in issuing ordinances or manuals along the general lines of Lieber's "Instructions." Such ordinances were promulgated by the government of the Netherlands in 1871,<sup>2</sup> by the French government in 1877,<sup>3</sup> by the Swiss government in 1878, by Servia in 1879, by Spain in 1882, by Portugal in 1890 and by Italy in 1896.<sup>4</sup> In 1879 the work of preparing a British Manual was undertaken but it was not completed until 1882. It contained a chapter prepared by Lord Thring, on the customs of war, but it was expressly stated to have no official authority. In 1904 Professor Holland's "Handbook of the Laws and Customs of War on Land" was issued by the British government to the army and in 1908 a new edition entitled the "Laws of War on Land" (written and unwritten) embodying the rules of the Hague Conventions was issued.<sup>5</sup>

<sup>1</sup> *Op. cit.*, p. 6.

<sup>2</sup> It was entitled "Practical Manual of the Laws of War" and was prepared by General den Beer Poortugael. The government without directly sanctioning the manual ordered that it should be used as a text book for the instruction of officers.

<sup>3</sup> *Manual de Droit International à l'Usage des Officiers de l'Armée de Terre*, prepared by M. Billot (3d ed. Paris, 1884).

<sup>4</sup> The character of some of these early manuals is discussed by Holland in his *Studies in International Law*, Ch. 4; by Merignhac in his *Les Lois de la Guerre Continentale*, pp. 4 ff.; and by Bellot in the *Grotius Society, Problems of the War*, Vol. II, p. 40.

<sup>5</sup> Holland, *Letters to the Times on War and Neutrality*, pp. 24, 62.

Meanwhile the Manual of Military Law of 1882 was revised and amplified, the last edition appearing in 1914. It is a very considerable volume containing the texts of the army Act and the rules of procedure thereunder, fourteen chapters on a variety of matters of interest to the army, such as the history of military law, courts martial, officers and punishment, etc., written by different authors. From the point of view of international law the most important part of the Manual is the chapter (XIV) on "the laws and usages of war on land," written jointly by Colonel Edmonds and the late Professor Oppenheim, Whewell Professor of International Law at Cambridge University. It embodies in 510 articles the rules found in the international Conventions dealing with the laws of land warfare, particularly those framed at Geneva and the Hague, and as to matters not regulated by the Conventions it declares that they "remain the subject of customary rules and usage."<sup>1</sup> The Manual is enriched by numerous historical and explanatory notes and references to the practice in recent wars. The means which a belligerent may employ to overcome his enemy are declared to be "definitely restricted by international conventions and declarations and also by the customary rules of warfare" and it adds, "there are the dictates of religion, morality, civilization, and chivalry which ought to be obeyed." It condemns the practice of placing innocent enemy civilians on trains to deter the enemy from wrecking them, although it admits that the practice was followed by the British commanders during the Boer War.<sup>2</sup> It forbids the putting of prisoners to death in any circumstances;<sup>3</sup> condemns the infliction of collective punishments upon communities for individual acts for which the community cannot justly be held responsible;<sup>4</sup> forbids the exaction of compulsory service of the inhabitants of occupied

<sup>1</sup> Manual, edition of 1914, p. 235.

<sup>2</sup> *Ibid*, p. 306.

<sup>3</sup> *Ibid*, p. 247.

<sup>4</sup> *Ibid*, p. 292.

territory for the construction of intrenchments and fortifications;<sup>1</sup> forbids the levying of contributions for the enrichment of the occupying belligerent and allows the requisition of supplies only for the needs of the army, and these must be paid for.<sup>2</sup> Altogether the rules of the British Manual represent the most liberal and humane sentiment of to-day and they are in accord with the enlightened views which prevail among civilized peoples regarding the conduct of war on land. A noticeable feature of the Manual is the recognition which it accords to the Hague and other international conventions which deal with the conduct of land warfare. They are cited in almost every article and are printed textually as appendices to the Manual. In no instance are their rules rejected, departed from or criticized as impracticable and therefore not likely to be observed by belligerents.

The value of such manuals as Lieber's "Instructions" impressed the delegates to the first Hague Conference and the Convention respecting the laws and customs of war adopted by the Conference imposed upon the contracting parties an obligation to issue instructions to their armed forces which should be in conformity with the regulations governing land warfare annexed to the Convention. The states, however, complied tardily with the obligation and some have apparently not yet done so. The fact, however, that the promulgation by the different governments of manuals of this kind was made a legal obligation gave them a sanction and an importance which they had not formerly enjoyed. The first manual to be promulgated following the Hague Conference was the *Kriegsbrauch im Landkriege*, prepared by the German General staff for the guidance of military commanders and issued with the approval of the government in 1902.<sup>3</sup> It consists of an introductory chapter on the

<sup>1</sup> *Ibid*, p. 293.

<sup>2</sup> *Ibid*, p. 298.

<sup>3</sup> It has been translated into French by M. Carpentier and published under the title *Les Lois de la Guerre Continentale* (Paris, 1904)

nature and usages of war, followed by 15 chapters grouped into three parts, one dealing with the usages of war in respect to the enemy's army, one with the usages in regard to the treatment of enemy territory and the inhabitants thereof, and one with the usages in respect to the rights and duties of neutral states. Among the particular matters treated are the means of injuring the enemy, treatment of the sick and wounded, intercourse between belligerents, spies, deserters, newspaper correspondents, military occupation, treatment of private property, requisitions, contributions, etc. In arrangement, content, and fulness of detail it falls far short of the American, British and French manuals and it has been much criticized for the extreme views which it embodies particularly in regard to the nature and objects of war and the means that may be employed by a belligerent to overcome his adversary. In this respect its rules represent the views of the older German militarists such as von Clausewitz, von Hartmann, and von Moltke rather than the more liberal and humane ideas of recent jurists and text writers. With a single exception the opinion of no great non-German jurist or text writer on international law is cited as an authority and the more enlightened and humane practice of recent wars is ignored in favor of the old and harsher practice of earlier wars. Wherever a German writer could be found to support the extreme views of the general staff his authority was invoked; others were not mentioned. It adopts the view that war is a conflict between peoples rather than between the armed forces; that it is legitimate to destroy the spiritual (*geistig*) as well as the material power of the enemy state; that it is permissible to terrorize the civil population; to bombard enemy towns without notice; to compel the inhabitants of occupied territory to perform military service and act

and into English by Professor J. H. Morgan of London and published under the title *The War Book of the German General Staff* (New York, 1915).



as guides; to exact pecuniary tributes not merely for the needs of the army but for the purpose of breaking the power of resistance of the enemy and of compelling him to sue for peace; to requisition supplies without regard to the resources of the inhabitants and without obligation to pay for the same; and to impose collective penalties upon communities for offences for which responsibility can hardly be attributed to the community. Perhaps the most distinguishing feature of the manual is the extreme view which it adopts of military necessity, which, as interpreted by the general staff, practically relieves belligerents of all obligation to conform to the laws of war whenever conformity thereto would interfere with the attainment of the object of the war. Military commanders are warned against the influence of the humanitarian tendencies of the age and the humane rules of the Hague Conventions are characterized as "sentimentalism and flabby emotion" (*Sentimentalität und weichliche Gefühlsschwärmerie*). In fact, the Hague Conventions are rarely mentioned in the manual and when they are it is usually only in derision. Some of the views enunciated in the manual are directly contrary to those of the Hague Conventions, notwithstanding the obligation of the contracting parties to conform their manuals of instruction to its regulations. In other instances the rules of the convention are dismissed with the statement that they are impracticable and will never be observed in practice by belligerents. In these respects the German manual forms a striking contrast to those of other states and particularly those issued under the authority of the American, British and French governments.<sup>1</sup>

The French manual entitled *Les Lois de la Guerre Continentale* was prepared by Lieutenant Robert Jacomet and

<sup>1</sup> It appears that in 1908 a new manual for the use of German officers, prepared by Michaelis, and entitled *Der Dienstunterricht des Infanterie-officiers*, was issued by authority of the German government. A French writer, Dampierre (*German Imperialism and International Law*, pp. 151-153) remarks that the provisions of these instructions are quite in harmony with the regulations of the Hague Convention.

published under the direction of the historical section of the general staff of the French Army (4th edition, 1913.)<sup>1</sup> The text proper consists of 154 articles and is preceded by an introduction and a preface written by Professor Renault. It reproduces textually the rules of the Hague and Geneva Conventions so far as they relate to the conduct of land warfare and generally each article is followed by explanatory and interpretative notes, which occasionally declare that the rules shall be interpreted liberally and in favor of the rights of the inhabitants. Like those of the American and British manuals they are in accord with the rules of the international conventions and the enlightened views of modern jurists, and text writers. In scope, the text proper of the French manual is much less comprehensive than those of the United States and Great Britain, but it is admirably arranged and is well annotated. In addition to the text, there is a series of annexes dealing with such matters as persons authorized to accompany the army, prisoners, requisitions, administration of occupied territory, and relations between belligerents, as well as the texts of the international conventions relating to land warfare.

A number of other governments have issued manuals or ordinances in conformity with the obligation imposed by the Hague Convention of 1899. Among the more important of these may be mentioned the Swiss regulations of 1904 and the Austro-Hungarian regulations of 1913, both of which embody textually the rules of the Hague conventions relating to land warfare.<sup>2</sup> On February 28, 1904, the Russian government issued an imperial order laying down certain rules of warfare which it purposed to observe in the war with Japan and, in addition, it announced that it would be bound by the Declaration of St.

<sup>1</sup> Published by Fournier and Pedone, Paris.

<sup>2</sup> An English text of the Austro-Hungarian regulations may be found in the "Proclamations, Orders in Council and Documents Relating to the European War" (2d Supp., pp. 451 ff.), compiled and published by the Secretary of State of Canada in 1916.

Petersburg of 1868 and the Geneva and Hague Conventions. On July 14, it issued a more elaborate code of "instructions" respecting the usages and customs of land warfare.<sup>1</sup> From time to time the Japanese Government issued regulations dealing with particular matters, such as the treatment of prisoners.<sup>2</sup>

Such are some of the more important manuals, ordinances or "instructions" that have been issued by governments for the regulation of the conduct of their armed forces in land warfare. A number of governments have also issued similar regulations relating to the conduct of their naval forces in maritime warfare. As long ago as 1860 the government of Norway promulgated such a code and Sweden followed its example in 1864 by issuing a rather elaborate maritime code in 323 articles.<sup>3</sup> In 1861 the government of Prussia issued a code of general commercial law which contained many provisions dealing with matters of maritime law.<sup>4</sup> In 1866 Mr. Godfrey Lushington was charged by the British Admiralty with the preparation of a manual of naval prize law for the guidance of the officers of the Royal Navy in case of maritime war. It consists of an introduction and 303 articles grouped in 18 chapters and deals with matters usually treated in naval codes.<sup>5</sup> This work served as the basis of the later manual of naval prize law prepared by Professor Thomas E. Holland and issued by authority of the Admiralty in 1888. This manual was divided into three parts, embracing 326 articles; the first part summarizes the general principles concerning the powers of naval commanders in time of war; the second part deals with the rules governing the detention or capture of foreign ships; and the third part lays down the rules

<sup>1</sup> The French text may be found in *Archives Diplomatiques*, Vol. 94, 3d series (1905), pp. 500 ff. An English translation is given in Hershey, *International Law and Diplomacy of the Russo-Japanese War*, pp. 271 ff.

<sup>2</sup> Texts in Hershey, *op. cit.*, pp. 281 ff.

<sup>3</sup> French text in 8 *Rev. de Droit Int.*, pp. 616 ff.

<sup>4</sup> It was entitled *Allgemeines deutsches Handelsgesetzbuch*.

<sup>5</sup> Published by Butterworth at London, 1866.

governing visit, search, detention, and adjudication. As a whole, the manual contains a systematic *exposé* of the views of the British Government in respect to the rights of belligerents in maritime warfare, as they are deduced from treaties and conventions, usage and the decisions of British prize courts, of which the author cites not less than 200 cases. Altogether the manual constituted a veritable code of maritime law as it was recognized by the British government and as such it was of great practical use as well as of scientific value.<sup>1</sup> Unfortunately it was never revised and brought up to date so as to conform to the more recent conventions and developments in the law of maritime warfare.<sup>2</sup>

In 1895 the Russian government issued a code of prize regulations in 93 articles dealing with such matters as visit, search, capture and the organization of prize courts, but it was less comprehensive and complete than the British manual.<sup>3</sup>

As we have seen, the Hague Convention of 1899 relative to the laws and customs of war on land made it the duty of the contracting parties to issue regulations for the guidance of their

<sup>1</sup> See the appreciation of Nys in 20 *Rev. de Droit Int.*, p. 93.

<sup>2</sup> In the controversy over the case of the *Bundesrath* in 1899 (Parl. Papers, 1900, Africa, No. 1) it was denied that the manual of naval prize law had any authority and it has since been withdrawn. The English system of prize law rests chiefly on the Naval Prize Act of 1864, the Prize Courts Act of 1894, and various orders in council issued thereunder. The remainder consists of judicial decisions. The procedure of the prize courts is regulated by the prize court rules of 1914, issued by an order in council of August 5, 1914. Thomas Gibson Bowles, in his book *The Declaration of Paris* (p. 7), published in 1900, lamented the fact that the British Government had not thought it advisable to issue a code of instructions for the use of its naval commanders. "The crying need of the British navy which experience daily emphasizes," he wrote, "is a manual of the law of nations for the special use of British seamen." A British naval captain, he added, who might make a capture alone and far away from all counsel, was left when confronted by a difficult case "to steer his way through the intricacies of the law without any other aid than he could derive from a few ill-chosen works on the law of nations in general.....and which often fail to meet the seaman's case in a way which a seaman could understand."

<sup>3</sup> French text in 4 *Rev. Gén., Docs.* No. 6.

armed forces in land warfare, which should be in conformity with the regulations annexed to the said conventions. The Conference, however, not having adopted a convention relative to the conduct of maritime warfare naturally did not impose a similar obligation upon the contracting parties in respect to the issue of naval regulations. But the Conference of 1907 expressed the *vœu* that the preparation of a *règlement* relative to the laws and customs of maritime warfare should have a place on the program of the next conference and that in any case the powers might apply, as far as possible, to war by sea the principles of the convention relative to the laws and customs of war on land.<sup>1</sup> It was to respond to this desire that the Institute of International law, as has been pointed out, undertook the preparation of its manual on the laws of maritime war which was adopted in 1913.

The Institute was impressed by the desirability of a code of written rules governing the conduct of maritime warfare, to supplement the regulations adopted by the Hague Conference in regard to the conduct of land warfare. In short, what had been done to regulate the conduct of war on land should be equally done to regulate the conduct of maritime war.<sup>2</sup>

In the meantime the government of the United States took the initiative, as it had done in 1863 in respect to land warfare, and issued a naval code for the "guidance and use of the naval service." It was prepared by Captain (now Admiral) Stockton of the United States Navy and President of the Naval War College, in pursuance of instructions from the Secretary of the

<sup>1</sup> In the circular sent to the powers in March-April, 1906, suggesting the program for the Second Hague Conference, the Russian government proposed the consideration of a Convention relative to the laws and usages of maritime war which should contain the provisions of land warfare which were equally applicable to maritime warfare, but no such convention was agreed upon.

<sup>2</sup> Preliminary report of M. Fauchille, 25 *Annuaire de l'Institut*, p. 42.

Navy, who directed him to draw up a set of rules which would serve for the navy the purpose which Lieber's "Instructions" served for the army. On June 27, 1900 the code was officially issued by the Secretary of the Navy, with the approval of the President and was published "for the use of the navy and for the information of all concerned." It was therefore regarded as expressing the official views of the United States in respect to the matters of naval warfare with which it dealt. It was prepared with great care and with the advice and criticism of various persons within and without the navy and it was drawn with the hope that possibly it "should be presented to other countries as an international project."<sup>1</sup>

The code was a comparatively brief document consisting of 55 articles arranged in nine sections and dealing with such matters as the means of conducting hostilities at sea, capture, the status of hospital ships, exercise of the right of search, blockade, contraband and the disposition of prizes. Matters of naval warfare to which the Hague Convention in respect to the laws and customs of war on land are equally applicable, such as the treatment of prisoners, spies, military occupation and the like were not dealt with at all in the naval code, nor were certain other matters such as conversion of vessels into warships and transfers of flag. But practically all of the Hague Convention for the extension of the principles of the Geneva Convention to maritime warfare, as well as the rules of the convention respecting the treatment of enemy merchant vessels in the ports of the opposing belligerent at the outbreak of war, were incorporated in the code.

The code took pronounced ground upon various matters of maritime law concerning which there was a divergence of view

<sup>1</sup> The history of the preparation of the code is detailed in the *Naval War College, International Law Discussions*, for 1903, pp. 5 ff. The text is printed in the same publication, pp. 103 ff. See also the *Proceedings of the American Society of International Law*, 1908, pp. 104 ff.

and practice and some of its rules constituted a distinct advance upon the views and practices of other governments. The right of bombardment was restricted to very narrow limits ; the use of false colors was forbidden ; the right of reprisal was allowed only in case of " necessity " and even then it could not exceed in severity the offense committed ; the absolute immunity of innocent coast fishing vessels was proclaimed ; neutral ships under convoy were exempted from search ; submarine cables connecting belligerent with neutral territory could be " interrupted " only within the territorial jurisdiction of the enemy and it spoke with no uncertain voice in regard to the immunity of neutral mail steamers and their mail bags.

The issue and publication of the code attracted wide attention among jurists and naval officers and the example was generally commended as one which should be followed by other governments. The *London Times* in an editorial<sup>1</sup> commended it to the consideration of the British government. It said : " In the absence of any teaching on international law, except for a few lectures to some fortunate captains and commanders at the Royal Naval College, the least that might be done is to afford them such aid as the American Navy Department does to its own officers. This little code of laws deserves to be noted as another product of the United Naval War College, to which we owe Captain Mahan's work on sea power ; while in comparison Great Britain is content to spend 200 pounds per annum on a naval strategy course, which includes a lecture on naval history, fee of 5 pounds a lecture." Professor Holland in a letter to the *Times*<sup>2</sup> pointed out its excellent features and added : " It is worth considering whether something resembling the United States code might be better arranged than its predecessor, and would differ from it on certain questions, but should resemble

<sup>1</sup> Issue of April 5, 1901.

<sup>2</sup> Issue of April 10, 1901. See also his *Letters on War and Neutrality*, p. 30.

it in clearness of expression, in brevity, and above all things, in frank acceptance of responsibility. What naval men most want is guidance in categorical language upon those points of maritime international law upon which the government has made up its own mind."

As stated above the code represented the views held by the government of the United States in regard to the rights and duties of belligerents in maritime war but in a number of respects the rules it announced were not those which European governments accepted or followed. In a war between the United States and a European power, therefore they would be binding upon the United States but not upon its adversary. When the consequences of this disadvantage to which the United States would be exposed became more evident, official sentiment against the manner in which the American government had thus tied its own hands became more pronounced and accordingly the order by which the code had been put into effect was revoked by the Secretary of the Navy on February 4, 1904. The Secretary of State, Mr. Root, in his instructions to the American delegates to the Second Hague Conference in 1907 stated that the code had been withdrawn, not because of "any change of views as to the rules which it contained, but because many of those rules, being imposed upon the United States by the order, would have put our naval forces at a disadvantage as against the forces of other powers, upon whom the rules were not binding." At the same time, the American delegates were instructed to urge upon the conference the formulation of international rules for war at sea and to offer the Naval Code of 1900, with the suggested changes and such further changes as may be made necessary by other agreements reached at the conference, as a tentative formulation of the rules which should be considered.<sup>1</sup> Later, however, the objection referred to above appears to have been overcome and in 1917, during the World

<sup>1</sup> *Procs. Am. Soc. of Int. Law*, 1908, p. 113.



War, but while the United States was still neutral, a new code entitled "Instructions for the Navy of the United States Governing Maritime Warfare" were issued by the Secretary of the Navy "for the information and guidance of the Naval Service."<sup>1</sup> It was prepared, we are told, "in accordance with international law, treaties, conventions to which the United States is a party, the statutes of the United States, and, where no international agreement or treaty provision exists concerning any special point, in accordance with the practice and attitude of the United States as hitherto determined by court decisions and executive pronouncements." It consists of 113 articles arranged in 16 sections. There are few explanatory notes but numerous references to treaties between the United States and other powers, and to the Hague Conventions. The code follows the general lines of that of 1900 and its rules are substantially the same.

In 1908 the Italian government issued a code of "rules of international maritime law in time of war" for the use of its naval officers and commanders. In addition to its appendices it contained 295 articles, based on the laws, decrees and regulations of the Italian government, treaties in force, the Hague Conventions and the usages of war. In the margin of each article was a reference to the official document from which it was drawn and there were numerous explanatory and historical notes.<sup>2</sup>

On September 9, 1909 the German Imperial government issued an ordinance of prize law (*Prisenordnung*) and on April 15, 1911 it was followed by the promulgation of an ordinance relating to the establishment and procedure of prize courts (*Prisengerichtordnung*). Both ordinances were repromulgated

<sup>1</sup> Washington, Government Printing Office, 1918.

<sup>2</sup> The prize commission during the Turco-Italian War (1911-1912) often cited these rules in its decisions but denied that they were obligatory and even declared that they had no "legal value." Coquet, *La Guerre Turco-Italienne*, 21 *Rev. Gén.*, p. 107.

together with several amendments in August, 1914 upon the outbreak of the European War. Together they constitute a fairly complete body of rules governing captures at sea, search, transfers of flag, contraband, unneutral service, blockade and prize adjudication. Differing from the *Kriegsbrauch im Land Kriege* the German Naval Code conforms in most particulars to the rules of the Hague Conventions relative to maritime warfare and its rules concerning transfers of flag, contraband, unneutral service and blockade are, in the main, literal reproductions of those of the Declaration of London. It departs, however, from the Declaration of London in permitting destruction of prizes for inability of the captor to spare a prize crew, for lack of a sufficient coal supply or because of proximity to the enemy's coasts, although it might be argued that the right granted by article 49 of the Declaration of London to destroy prizes when the taking of them in for adjudication would "involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time," would include the right of destruction in the circumstances set forth above by the German prize code. A rule of the German prize code which was systematically violated by German naval commanders during the Great War was that which required captors to provide for the safety of passengers and crews before proceeding to destruction. But the code itself was irreproachable and formed a striking contrast to the German code of land warfare described above.<sup>1</sup>

France followed in 1912 by issuing a manual for the use of the officers and forces of the Navy. It was prepared by the first section of the general staff and was issued by the Minister of Marine on December, 1912 and was reissued in amended

<sup>1</sup> The German prize code has been translated into English by C. H. Huberich and Richard King under the title *The Prize Code of the German Empire as in Force, July 1, 1915* (New York and London, 1915). The English translation is also accompanied by the German text.

form on January 30, 1916.<sup>1</sup> In arrangement, the code consists of 34 articles divided into 166 sections, to which there are annexed as appendices the texts of the various international conventions, and various decrees, instructions and formularies, making altogether a volume of 208 pages. In content and scope the manual follows the general plan of the United States naval code of 1900 and is based on the Declaration of Paris, the Hague Conventions and the Declaration of London, subject to certain modifications of the rules of the latter made by decree of the French government after the outbreak of the World War. Unlike the American code it deals with transfers of flag and lays down the rule that the nationality of the owner of a ship rather than the flag it flies shall determine its character. The rules it adopts concerning coastwise fishing vessels, cutting of cables, convoys, mail steamers, destruction of prizes and naval bombardments are substantially the same as those of the American Code of 1900.

By a decree of May 2, 1913 the Austro-Hungarian Government promulgated a code of regulations to be observed by its naval commanders during maritime war. Its rules embody only "the provisions of the international law on war in so far as they have been fixed by agreements." They reproduce in the main the provisions of the Declarations of Paris and of London and those of the Hague Conventions respecting maritime war.<sup>2</sup> It is added, however, that "if necessary, regulations varying from the same will be issued."<sup>2</sup>

<sup>1</sup> It is entitled *Instructions sur l'Application du Droit International en Cas de Guerre, Addressées par le Ministre de la Marine à Mm. Les Officiers Généraux, Supérieurs et Autres Commandant les Forces Navales et les Batiments de la République*. It was published by the *Imprimerie Nationale* (Paris, 1916). The English text of the 1912 edition may be found in *International Law Situations, Publications of the United States Naval War College*, for 1913, pp. 169 ff. The French text of the 1916 edition may be found in 25 *Rev. Gén. de Droit Int. Pub.* (1918), pp. 60 ff.

<sup>2</sup> English text in "Proclamations, Orders in Council and Documents" issued by the Canadian Government, referred to above, 2d *Supp.*, pp. 425 ff.

Upon the outbreak of the World War, several of the belligerents issued more or less detailed regulations for the guidance of their naval forces either to supplement their existing codes or to supersede them. Among these may be mentioned the "Rules relative to the exercise of the right of prize during the present war" issued by the Italian government on March 25, 1917.<sup>1</sup> Prior to the entrance of Italy into the Great War its maritime law consisted of some articles in the merchant marine code of 1877, some provisions in the *règlement* of 1898 relative to the service of the ships of the royal navy and the rules of 1908 referred to above, which appear not to have been regarded as having had any legal force. In 1916 the task of preparing a revision of the existing rules and of embodying them in a code was entrusted to a commission and the code as promulgated in March 1917 was the result of its labors. It is arranged in eight titles and 112 articles and is accompanied by a valuable report explaining the history of its preparation and pointing out the modifications which it makes of the rules of the international conventions.<sup>2</sup> In the main, its rules are those of the Declarations of Paris and London and the Hague Conventions with some modifications and additions. The old rule of the Italian Merchant Marine Code of 1877 (Art. 211) which sanctioned the immunity of private property from capture in maritime war, on condition of reciprocity of treatment, was suspended for the period of the existing war, although the government was authorized in its discretion to renounce the right of capture of such property upon condition of reciprocity on the part of the enemy. The rules of the Hague Convention respecting the treatment of enemy merchant vessels in port at the outbreak of

<sup>1</sup> Italian text in the *Gazzetta Ufficiale*, of April 26, 1917; French text in 23 *Rev. Gén. Docs.*, pp. 193 ff., and in Fauchille and Basdevant, *Jurisprudence Italienne en Matière de Prises Maritimes* (Paris, 1918), pp. xlv ff.

<sup>2</sup> The text of the report may be found in Fauchille and Basdevant, *op. cit.*, pp. xlv ff.

war were adopted ; so were those of the Declaration of London respecting transfers of flag except that the presumptions of invalidity were altered somewhat ; liability of ships to capture was made to depend upon the nationality of the owner rather than upon the nationality of the flag ; the rules of the Declaration of London respecting blockade were modified so as to permit blockade of areas of the sea adjacent to the enemy coast or occupied by the enemy fleet ; the right of naval commanders to requisition ships or goods was authorized ; what constitutes hostile assistance was defined in detail ; the formalities of visit, search and capture were prescribed with even more detail ; and it was expressly affirmed that captors might take their prizes into port for the purpose of search. The right to destroy prizes was declared to be permissible only in exceptional circumstances such as rendered dangerous the preservation of the prize and in case of destruction the safety of the persons on board must be provided for in advance. The most important departures from the Declaration of London were those in respect to contraband. The experience of the existing war, it was pointed out in the report accompanying the code, had proved that the rules of the Declaration of London were no longer in conformity with the conditions of modern maritime war. It was no longer practicable to determine a fixed list of contraband articles and no attempt was therefore made. Finally, the distinction between absolute and conditional contraband served no useful purpose and it was therefore abandoned in the Italian code as it had been done by the English and French governments. Enemy destination rather than use was made the sole test of the liability of contraband to capture and the principle of continuous voyage was applied to the transportation of all contraband whatever its character.

\* Such is a *résumé* of the movement initiated in 1863 by the American government and which has resulted in the partial codification by so many states of the laws of land and maritime warfare. The movement has been in response to the obvious

necessities of the time. As the report accompanying the Italian Naval Code of 1917 pointed out, it was highly desirable that the military and naval forces as well as the administrative and judicial authorities should be furnished with clear and precise written rules of conduct in order that all interests involved should be properly safeguarded.<sup>1</sup> It is right also that the opposing belligerent as well as neutrals should know what those rules are. But the chief defect of these manuals is that being only unilateral acts they have no internationally binding force. They are binding only upon the governments issuing them, except in so far as their rules are a recognised part of international law and they may of course be altered or revoked at any time.<sup>2</sup> Nevertheless, in spite of their limited value they have demonstrated the possibilities of codification as well as the advantages of precise written rules. An international code formulated and approved by the whole body of states and consequently binding upon them all is necessary to complete the work already done by so many states acting separately. Only in this way can differences of opinion and practice be removed and a common body of rules obtained.

Already a beginning has been made; in fact a very considerable part of the international law governing the conduct of war, especially of war on land, has now been reduced to written form and embodied in international conventions. The starting point in this movement, in fact antedating by several years the

<sup>1</sup> Compare also the remarks of Mr. Godfrey Lushington in the preface to his manual of naval prize law, regarding the advantages of such a code. Naval commanders, as he pointed out, are not usually lawyers. In the absence of a naval code their authority must be sought in a mass of orders in council, acts of parliament, treaties, international conventions and the usages of warfare. A mistake may cost a naval commander his fortune and position and besides involve his country in a serious controversy with another power. "In such an emergency an officer should welcome a book which directed him, briefly and clearly, what to do and what not to do."

<sup>2</sup> Cf. Renault in his preface to the French Manual, p. 10, and Holland, *Laws of War on Land*, p. 2.

Instructions for the government of the United States armies, was the Declaration of Paris of 1856 which formulated certain rules respecting maritime warfare and which have received the sanction, express or tacit, of all maritime powers. These rules have been expressly incorporated in all the naval codes issued by states. The Declaration of Paris was shortly followed by a more important event in the history of international codification, namely, the Geneva Conference of 1864, at which sixteen states were represented and which formulated a body of rules for the amelioration of the condition of the sick and wounded of armies in the field. It was the first attempt to define and codify through international agreement certain usages of war,<sup>1</sup> and the Convention in which they are embodied was accepted by practically all states. In 1906 the convention was revised and improved and it too has met with universal acceptance. The Geneva Convention of 1864 was followed by the Declaration of St. Petersburg in 1868 which affirmed certain humane principles regarding the means which might be employed by belligerents in the conduct of war, which condemned the employment of arms which needlessly aggravate the sufferings of disabled men or render their death inevitable and by which the contracting parties mutually renounced the use of explosive projectiles, those charged with fulminating or inflammable substances and those weighing less than 400 grammes. The essential principle of the Declaration is formally embodied in most of the military manuals and it is incorporated by reference in Article 23 of the Hague *Règlement* respecting the laws and customs of war on land.

A landmark in the history of international codification was the Brussels Conference of 1874 at which 14 of the Continental European states and Great Britain were represented. It was called by the Czar of Russia in response to the increasing feeling that it was not only highly desirable but entirely

<sup>1</sup> Martens, *La Paix et la Guerre*, p. 81; also Davis in 1 *Amer. Jour.*, pp. 409 ff.

practicable to systematize and codify through international action the more important rules respecting the conduct of war on land. The need of such an agreement had been plainly revealed during the recent war between Germany and France when many controverted questions of international law arose between the two belligerents, which it was impossible for them to discuss calmly.<sup>1</sup> In the circular inviting the powers to participate in the conference the Czar dwelt upon the desirability of defining with more precision the laws and customs of war and of agreeing upon common rules which should be obligatory upon belligerents, on the basis of reciprocity. In spite of irreconcilable differences of opinion among the delegates, and especially between the representatives of the great military powers and those of the lesser powers, the project of a Declaration concerning the laws and customs of war, in 56 articles was agreed upon and adopted. The British government, however, which from the first was unsympathetic because it did not believe the time to be ripe for the codification of the laws of war, refused to ratify the Declaration, for various reasons, mainly because as was alleged it did not limit itself to a statement of the existing usages but contained various innovations for which no practical necessity existed and which if put into force would give the preponderant advantage to the great military powers which had large standing armies.<sup>2</sup> It would even facilitate aggressive wars and paralyze the protective resistance of an invaded people. In consequence of the attitude of the British government the Declaration remained

<sup>1</sup> Compare Martens, *La Paix et la Guerre*, pp. 91-92, and Holland, *Studies in International Law*, p. 79, as to the need of reducing the laws of war to written form.

<sup>2</sup> Bordwell, *Law of War*, p. 109; Martens, *op. cit.*, p. 109; Walker, *Science of International law*, pp. 364-366; Lorimer, *Institutes*, Vol. II, pp. 337 ff. The English writer Manning (*Commentaries on the Law of Nations*, p. xlv) expressed regret that England, which, he said, had always taken the lead in the movement to humanize the laws of war, should have assumed a position which paralyzed the work of the Conference.



without international effect. In the final protocol of the conference, however, it was stated that "the delegates without exception were in accord as to the imperative necessity of determining with more precision the usages and laws of war actually in force." The Institute of International Law, upon full examination in 1875, approved the Brussels draft as representing in its form and content "the zenith of present-day science" and as possessing a double advantage over the American Instructions of 1863 since it was designed to be an international agreement rather than the act of a single state. And it further added that it was "desirable that the laws and customs of war should be regulated by a convention, declaration or agreement of whatever character it may be, among the different civilized states."<sup>1</sup> Upon the outbreak of the Russo-Turkish War in 1877 the Institute addressed an appeal to both belligerents to observe its rules in their conduct of hostilities on land. The Russian government promptly issued a decree ordering all military and civil authorities of the Empire to observe them equally with those of the Geneva Convention and the Declaration of St. Petersburg.<sup>2</sup> The Ottoman government, however, appears not to have taken such action. The approval of the draft by so distinguished a body of jurists added much to its authority, and although never formally ratified it exerted a great moral influence upon the conduct of armies during the ensuing

Prince Gortchakoff replying to Lord Derby's criticism pointed out that the greater the difficulty in arriving at agreement upon the questions in dispute the more pressing was the need for friendly discussion; that if the rules concerning which differences of opinion existed were not formulated in clear and precise language they would be determined by force; that leaving the law in a state of uncertainty would only increase the number of acts of violence, reprisals, grievances and contradictory interpretations and that it was "precisely because the law of nations was wanting in precision and clearness that the Brussels project endeavored to supply, as far as possible, the place of these uncertainties, these blanks and these contradictions." Quoted in Walker, *op. cit.*, p. 368.

<sup>1</sup> *Annuaire de l'Institut*, Vol. I, p. 133.

<sup>2</sup> *Ibid.*, Vol. II, p. 154.

Wars.<sup>1</sup> Many of its rules found their way into the manuals issued by particular states; it served as the basis of the Institute Manual of 1880 and the Hague Convention respecting the laws and customs of war was in large measure merely a revision and amplification of its rules. The importance of the Declaration, said Professor Martens in 1889, consists in this: that "for the first time, an international agreement concerning the laws of war was to be established, really compulsory for the armies of modern states and designed to protect inoffensive, peaceable, and unarmed people from the cruelties of warfare and from the evils of invasion which are not required by imperious military necessities."<sup>2</sup>

Unquestionably, the high water mark in the history of international codification of the laws of war was reached in the work of the two Hague Conferences of 1899 and 1907. As is well known, the first conference formulated and adopted three conventions, three declarations, one resolution and six *vœux* on different subjects. The first of the conventions attempted to provide means for the settlement of disputes between states without recourse to war; the second extended and adapted the Geneva convention to maritime warfare and the third represented an attempt to codify the laws and customs of war on land. The latter convention was ratified by all the 26 states represented at the conference and it was subsequently adhered to by 19 states not represented.<sup>3</sup> The three declarations forbade the launching of projectiles and explosives from balloons, and the employment of asphyxiating gases and expanding bullets. The work of the Second Conference was far more important. It revised, enlarged and improved the conventions of 1899 in the

<sup>1</sup> Martens, *op. cit.*, p. 120. Compare also Spaight, *War Rights on Land*, p. 6; Hall, *Int. Law*, Atlay's ed., p. 524, and Renault's address cited above.

<sup>2</sup> Quoted by Hull, *The Two Hague Conferences*, p. 215.

<sup>3</sup> See table of ratifications in Scott, "The Hague Conventions and Declarations of 1899 and 1907," pp. 230-232.

light of new developments and experience and adopted ten new conventions regulating matters not dealt with by the conference of 1899. The new conventions lay down more or less detailed rules concerning the opening of hostilities, the treatment of enemy merchant vessels found in port at the outbreak of war or proceeding thereto, the rights and duties of neutral powers and neutral persons in land warfare, the conversion of merchant vessels into ships of war, the employment of submarine automatic contact mines, naval bombardments, restrictions upon the right of capture in maritime war, the establishment of an international prize court, the rights and duties of neutral powers in case of maritime war and the employment of force for the collection of foreign debts due on contracts. In addition to the conventions thus adopted, the declaration of 1899 forbidding the launching of projectiles and explosives from balloons was re-enacted.

The achievements of the Hague Conferences mark an epoch in the development of international law. They supplied the world for the first time with a large body of written law for the regulation of the conduct of war ; definite and precise rules carefully considered and clearly formulated took the place of customs and usages, the meaning of which was often uncertain, and agreement was reached upon many matters concerning which there had been divergencies of opinion and of practice among states. The great advantage of these rules over those found in the manuals issued by particular states was that they represented the opinion of the great body of states and were internationally binding upon them and could not be altered or revoked without the consent of all. The convention respecting the laws and customs of war on land approximated the character of a code and several of the other conventions were scarcely less important in this respect. No attempt was made by either conference to reduce to the limits of a code the whole body of international law governing the conduct of war : that would have been an undertaking which even the most ardent "codifier" would never have considered practicable to impose upon the

conference; the conference therefore wisely limited itself to the task of formulating certain general rules concerning such matters upon which agreement was possible.<sup>1</sup> It had to be content with partial codification and it therefore proceeded by the piecemeal method. In the preamble of the convention respecting the laws and customs of war on land it was expressly declared that its provisions were destined "to serve as general rules of conduct for belligerents in their relations with each other and with the inhabitants." It was manifestly not possible to lay down a complete body of rules which would apply to all circumstances likely to occur in practice and the conference made no attempt to do so. It left a large field of conduct to be regulated still by custom and usage. It took the precaution to declare, however, that cases not covered by the rules annexed to the conventions should not be left to the arbitrary determination of military commanders but that "until a more complete code of the laws of war is issued," belligerents and inhabitants should, when such cases arise, "remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." Much regret was felt that neither conference made any attempt to formulate a code of rules governing the conduct of maritime war. The advantages of defining and stating in compact and written form these rules are no less important than those which result from the similar treatment of the laws of land warfare and this was clearly recognized by the conferences but the task and the difficulties were too great to be undertaken at the time. The

<sup>1</sup> The spirit in which the Second Conference approached its task appears in the preamble to Convention No. VI where the "expediency" was affirmed "of giving up, or, if necessary, of harmonizing for the common interest, certain conflicting practices of long standing, of commencing codification of regulations of general application and of laying down in written mutual engagements the principles which have hitherto remained in the uncertain domain of controversy or have been left to the discretion of governments."

Second Conference, however, expressed the opinion that the next conference the early calling of which it recommended to the powers, should occupy itself with the task and that in the meantime the rules of the convention respecting land warfare should, so far as possible, be applied by the powers to maritime war.

In anticipation of this work, the Institute of International Law, as we have seen, prepared its manual of the laws of maritime warfare in 1913 in the hope that it might be of assistance to the Conference in the performance of its task.

Mainly on account of the outbreak of the World War the Third Conference has not yet been called but the task of codification mapped out for it in 1907 was undertaken by a different conference and at an earlier date than was originally anticipated, namely, by the International Naval Conference held at London in 1908-09. The calling of this conference was initiated by the British government which deemed it essential that an agreement should be reached among the maritime powers concerning the rules of international law applicable to naval warfare, in view of the provision made by the Second Hague Conference for the establishment of an international prize court which by the terms of the convention providing for it was charged with applying the somewhat vague and uncertain rules of "international law." The British government hesitated to ratify the convention and thereby bind itself to allow appeals from its own prize courts to a court composed in large part of judges from states whose interests and traditional views upon maritime law differed from those of Great Britain. It was therefore a matter of vital importance to the English that the rules of international maritime law which the court was to apply should be clearly formulated and reduced to writing in order that all divergencies of opinion and uncertainty might be removed. The conference succeeded in formulating and agreeing upon a body of rules in seventy-one articles, which is officially known as the Declaration of London. They deal in a fairly complete manner with such

matters as contraband, blockade, continuous voyage, destruction of prizes, unneutral service and transfers of flag. It is stated in the preamble that the signatory powers were agreed that these rules "correspond in substance with the generally recognised principles of international law," a statement however which is not entirely accurate.<sup>1</sup> Although like the Brussels draft of 1874 the Declaration was never formally ratified by any government it was not without influence during the Great War which soon followed and in fact it was put into effect by the various belligerents, with some modifications and additions which were not numerous and with one or two exceptions not of vital importance. It represented the first attempt of the maritime powers acting through the medium of an international conference to do for international maritime law what had already been done for the law of land warfare. It was a necessary and logical undertaking to complete the work of the Hague Conferences and the results will no doubt be accepted as the basis of the work of whatever future conference may be charged with formulating a new code of the laws of maritime warfare. It will therefore serve a purpose analogous to that which the unratified Brussels draft served for the Hague Conference of 1899. Although the London Conference was unable to reach an agreement upon certain points and although the experiences of the Great War demonstrated that some of the rules adopted were inadequate or not in harmony with modern conditions of naval warfare, the elaboration of the rules of the Declaration constituted a notable landmark in the progress of international codification. Elihu Root praised it as a necessary step in the development of international law.<sup>2</sup> The late Professor Nys, speaking in 1911 of the problem raised by the proposed creation of an international prize court, said: "Naturally, there is but one

<sup>1</sup> See further on this point, Lecture III.

<sup>2</sup> Address on "The Real Significance of the Declaration of London," Proceedings of the American Society of International Law, 1912, p. 14.

solution which is rational, and which, whatever is done, must be reached: that is the codification of maritime law in time of war." <sup>1</sup>

• None of the more recent conferences was primarily occupied with the formulation of rules of international law although that held at Washington in 1922 agreed upon a number of rules regarding the use of submarines against merchant vessels and the employment of asphyxiating, poisonous and other gases and analogous liquids, materials and devices in war, and embodied them in the form of a treaty which was signed by the plenipotentiaries of five powers who agreed to be bound by them as between themselves and to invite all other civilized powers to adhere thereto. Like others in the past it represented an attempt at piecemeal codification. The conference also adopted a resolution providing for the appointment of a commission consisting of not more than two representatives of each of the signatory powers to consider and report on the question whether the existing rules of international law "adequately cover new methods of attack or defense resulting from the introduction or development since the Hague Conference of 1907 of new agencies of warfare." In case its conclusions are in the negative it is to report upon the changes in the existing rules which it considers ought to be adopted as a part of the law of nations.<sup>2</sup>

Such are the efforts that have been made and such are the results that have been accomplished up to the present time through international action for the codification of international public law. Altogether the results represent very considerable progress although they have been confined almost entirely to the domain of the law of war. The work has proceeded, as the work of codification must proceed, gradually and by piecemeal. The law covering one particular part after another of the general

<sup>1</sup> "The Codification of International Law," 5 *Amer. Journal*, p. 896.

<sup>2</sup> 16 *Amer. Journal*, p. 189.

field has been formulated, stated in precise terms, and co-ordinated into definite rules and finally adopted by the body of states. It may now be said that the larger and more important part of international law governing the conduct of war, and specially of war on land, has been reduced to this form. This development represents the most notable achievement that has yet been attained in the slow progress of international law; further progress must lie along the same line and follow a similar course of procedure.

In a review of the progress of international codification it may not be out of place to remark that side by side with the movement for the codification of international public law has gone a parallel movement looking toward agreement upon the rules of international private law. The divergencies in the law of different states in respect to such matters as marriage, divorce, inheritance, guardianship, negotiable instruments, the execution of foreign judgments, and the like, have been even more pronounced than the differences of opinion which have prevailed concerning the rules of international public law. With increasing intercourse and of business relationships between the peoples of different countries the inconveniences of these diversities of law have been powerfully accentuated. As Professor Meili aptly remarks, "Man has become, as it were, an international subject of law. We are at the present time able to say, without exaggeration, that commerce is carried on with the greatest facility between the different parts of the world. Subjects of different nations intermarry. Contracts and other obligatory relationships are entered into outside the land in which the parties are citizens or are domiciled. Persons die and leave estates beyond the land of nationality or domicile. Legal instruments are executed in foreign lands between citizens of the same or different countries. Property is owned or possessed by persons alien to the territory in which it is situated." The situation is somewhat analogous to that which has existed, and still exists in large



measure, between the different states of the American Federal Union with their varying rules of law upon many matters which have ceased to be purely local in character. And as the inconveniences of this variety of law have led to a movement to secure through state commissions uniformity of legislation in respect to such matters as negotiable instruments, bills of exchange, bills of lading, warehouse receipts, insurance, marriage and divorce, etc., so the same diversity of law among the independent states of Europe has resulted in a concerted effort to agree upon common rules in respect to certain matters upon which the need of a common law is most urgent. Professor Meili justly remarks that international codification would seem possible and desirable upon such matters as the law relating to bills, commercial paper, patents and trade marks, railway traffic, postal and telephonic communication, and maritime law.<sup>1</sup> The initiative in this movement was taken by the government of the Netherlands at whose suggestion a conference on international private law was held at the Hague in 1893. This conference was followed by others at the same place in 1894, 1902, 1904, and 1910. At the conference of 1893 thirteen continental European states were represented by some 25 delegates, including such well known jurists as Meili of Switzerland, Torres Campos of Spain, Professor Asser of the Netherlands, and Martens of Russia. The conference occupied itself with the consideration of such matters as the law of marriage, the form of legal acts, wills, and judicial competence and procedure, with a view to removing the existing conflicts and of agreeing upon common projects to be submitted to the governments of the states represented by the conference. A series of rules concerning marriage, communication of judicial and extra judicial acts, rogatory commissions and inheritances, was drafted, signed by the delegates and submitted to their respective governments.<sup>2</sup>

<sup>1</sup> *Op. cit.*, p. 12.

<sup>2</sup> For the history and work of this conference, including the text of the projects adopted, see an article by the late Dr. Asser in 25 *Rev. de Dr. Int.* (1893), pp. 521 ff.

In conformity with a view expressed by the first conference, a second conference met at the Hague in September 1894, attended by delegates from 14 states, among them being Renault, Asser, Meili, Martens, Seckendorff and Pierantoni. At this conference the resolutions of the first conference were re-examined and re-adopted in revised and extended form. Two new subjects were also considered: namely, bankruptcy and guardianship, and a series of articles dealing with each was formulated and adopted. A third Conference was held in 1902 and on June 12 three conventions dealing with marriage, divorce and guardianship of minors were signed by the plenipotentiaries of 12 states (Germany, Austria-Hungary, Belgium, Spain, France, Italy, Luxembourg, the Netherlands, Portugal, Roumania, Sweden. and Switzerland) and they were ratified by all states represented at the conference.<sup>1</sup>

In 1904 a fourth conference at which Japan was represented was held and it adopted 5 conventions dealing in turn with civil procedure, effects of marriage on the rights and duties of the parties, deprivation of civil rights and similar measures of protection, succession and wills and bankruptcy.<sup>2</sup> Conventions embodying the first four projects were signed at the Hague on the 17th of July, 1905. The convention relative to civil procedure was intended to replace that of Nov. 14, 1896, some defects of which had been brought to light by experience. These conventions are fairly complete and approximate in some degree real codes on the subjects with which they deal.<sup>3</sup> Perhaps the most important of them is the convention on civil procedure, which was ratified or adhered to by all the states of continental Europe

<sup>1</sup> Texts, *ibid*, Vol. 34 (1902), pp. 486; see also Asser's review, *ibid*, 36, 516 ff.; and Kusters and Beelemans, *Les Conventions de la Hague de 1902 et 1905 sur le Droit International* (1921).

<sup>2</sup> See Asser's article, *ibid*, Vol. 36, pp. 516 ff.; also Jitta's address in the 27th *Report of the Int. Law Association*, pp. 322 ff., where the various Hague Conventions are analyzed.

<sup>3</sup> Texts, *ibid* (1905), pp. 646 ff.

except Turkey, Greece, Bulgaria, Servia, and Montenegro.<sup>1</sup> The other conventions have been less generally ratified though a goodly number of European states have accepted them.

In 1910 a fifth conference was held at the Hague for the purpose of studying the subject of bills of exchange and of bringing about unification of the law among the states of Europe. The conference elaborated two projects: one entitled a "Convention on the unification of law relative to bills of exchange and promissory notes." The latter regulated in a uniform manner the matters with which it dealt; the other, on the contrary, permitted the states ratifying it to depart in their legislation from the uniform act in respect to the matters indicated in the convention.<sup>2</sup> The conventions were signed by the representatives of 27 states.

The result of the work of these conferences is that a considerable part of continental European international private law has been unified and a common procedure for the application of foreign law has been agreed upon.<sup>3</sup> The task of unification and

<sup>1</sup> For comment and analysis of this convention see an article by Seresia in 30 *Rev. de Dr. Int.*, pp. 569 ff.

<sup>2</sup> Alvarez, *op. cit.*, p. 269.

<sup>3</sup> It ought to be remarked, however, that the primary task of these conferences was not so much to unify the law as to arrive at agreement between the different states by which conflicts in its application could be avoided. To a large extent the conventions respect the divergencies in the laws of different states, the conferences having limited themselves to determining which law in a particular case should be applied. In short, an effort was made to reach an agreement in order that the particular issue should be determined according to the *same* system of law no matter in what forum the issue is ultimately presented. Compare Kuhn in 7 *Amer. Jour.*, 775; Asser in the 20th *Report of the Int. Law Assoc.*, p. 299; and Baty, *Polarized Law*.

The second of the abovementioned conventions on bills of exchange was not, however, merely a collection of rules regarding the application of foreign law but it represented a real attempt to unify the law of the world on the subject, the signatories having undertaken an obligation to adopt the draft without change except in so far as changes are authorized by the convention itself. See Lorenzen, *Conflict of Laws relating to Bills and Notes*, p. 18.

Recently certain of these conventions have given rise to some dissatisfaction and in 1913 the French government denounced those of 1902 and

codification of international private law has been less difficult than the codification of international public law. At the outset it was found that there was already a considerable common element in the law of the different states and it was easier to reach an agreement on the matters concerning which there was diversity of law because agreement did not involve the same restrictions upon national sovereignty or affect in the same degree the "vital interests" of states, as concessions and renunciations in respect to the rights and duties of states in their relations with one another. The work was undertaken by assemblies of jurists meeting from time to time; projects were prepared in advance by committees; they were carefully discussed; sometimes they were re-examined and reconsidered by future conferences; in short, the procedure adopted was that which the nature of the task required and the results were probably the best attainable.<sup>1</sup> Much regret has been expressed by continental jurists that neither the United States nor Great Britain has so far taken part in any of these conferences. The English have alleged the "peculiar nature" of their law as a reason for their non-participation while the geographical remoteness of the United States has perhaps been the chief reason for American lack of interest. At the annual meeting of the International Law Association in 1903, however, Sir Walter Phillimore expressed regret that Great Britain had not been represented at any of the conferences and upon a motion of Sir William Kennedy the Association adopted a resolution

in 1916 it denounced those of 1905. In 1918 the Belgian government likewise denounced the conventions relative to marriage and divorce. See De Visscher in 48 *Rev. de Dr. Int.*, p. 368.

<sup>1</sup> See on the general subject, the work of Anzilotti, *La Codificazione del Diritto Internazionale Privato* (Firenze, 1894); Alvarez, *La Codification du Droit International*, pp. 250 ff.; a learned article by Catellani, *le Droit International au Commencement du XX Siècle*, 8, *Rev. Gén.*, pp. 385 ff.; and an article by Olivi entitled *De la Codification du Droit International Privé*, in 26 *Rev. de Dr. Int.*, pp. 511 ff.

expressing the opinion that Great Britain should be represented at future conferences.<sup>1</sup>

In the work of codification of international private law, the Institute of International Law has extended its valuable co-operation in the same way that it has aided the movement for the codification of international public law. It has elaborated projects of treaties and resolutions respecting such matters as marriage and divorce, guardianship, inheritance, civil procedure, commercial law, execution of foreign judgments, marine insurance, marine collisions, admission and expulsion of aliens, extradition, nationality, expatriation, emigration, etc. Carefully prepared and approved by jurists whose competence in such matters was of the first order, they exerted an important influence upon the conclusions of the Hague Conference which occupied themselves with the various matters of international private law here under discussion.<sup>2</sup>

Somewhat analogous to the movement for the unification of international private law relative to the matters mentioned above may be mentioned the activities of the International Maritime Committee founded in 1898 to bring about greater unification of maritime law. Through its initiative conferences of the powers were held at Brussels in 1905 and 1909-10, the result of which was the conclusion in the latter year of two important conventions, one dealing with indemnities resulting from collisions of ships and the other with conditions under which remuneration for assistance or salvage may be claimed. These conventions were signed and ratified by most of the important maritime countries of the world so that the Secretary of the International Maritime Committee could say in 1913 that more than "three quarters of the tonnage of the world is now

<sup>1</sup> Meili, *op. cit.*, p. 20. American jurists also are not lacking who think both the United States and Great Britain should take part in these conferences. See Kuhn in 7 *'mer. Journal*, 778.

<sup>2</sup> For a summary of the work of the Institute in this field see Asser in 25 *Rev. de Dr. Int.*, pp. 522 ff.

regulated by uniform maritime law elaborated by the International Maritime Committee." At a conference held at London in 1914 upon the invitation of the British government, at which representatives of 13 powers including the United States, attended, a convention dealing with safety of life at sea was signed and it has been ratified by a number of the signatory governments.<sup>1</sup>

The progress thus achieved toward agreement and codification of both international public law and international private law has naturally increased the number of persons who believe that it is not only desirable but practicable to reach an agreement upon and reduce to the limits of a code the whole body of rules of international public law. What has been so well done in respect to particular parts of the law, such, for example, as the law of land warfare, may, it is argued, be equally done of other branches of the law. As has already been pointed out, earnest advocates of general codification have not been lacking for more than a century and the work of Bentham, Bluntschli, Field and Fiore has popularized in some degree the idea. Advocates and partisans of the idea have naturally been more numerous on the continent of Europe and in Latin America where the codification of national law has made the greatest progress but they have by no means been wanting in England and the United States. In Latin America, especially, juristic sentiment has long been preponderantly on the side of codification and ever since their emancipation the Latin American states have taken deep interest in the matter. In the various pan-American Congresses that have been held from time to time, and notably those of 1889, 1901-02, 1906 and 1910, the question of codification was seriously discussed and efforts were made to advance the cause. At the conference of 1889

<sup>1</sup> As to these conventions on maritime law see Woolf, *International Government*, pp. 266 ff.; Nielsen in 13 *Amer. Journal*, pp. 1 ff.; and Wheeler, *ibid*, 8, 758 ff.

at Montevideo five conventions were signed by the representatives of seven states dealing with such matters as civil, commercial and criminal law, judicial procedure, copyright, patents, trade marks and the practice of learned professions.<sup>1</sup> At the second pan-American conference held at Mexico City in 1901-02 a treaty on codification was signed providing for the appointment of a commission of five American and two European jurists to prepare codes of international public and private law concerning especially the relations among the states of America. At the third conference held in the city of Rio de Janeiro in 1906 the question of codification was again on the program and a convention was signed which provided for the holding of an assembly of jurists in that city the following year to undertake the preparation of the codes of international public law which the second conference had entrusted to a commission. For several reasons the meeting of the assembly of jurists was delayed until June 1912. Representatives from 17 states including the United States then attended and Dr. Pessoa of Chile was elected president of the conference. Two projects, prepared by two eminent Brazilian publicists, were submitted by the Brazilian government to serve as bases for the deliberations of the conference. At the outset, however, it was evident that the preparation of the proposed codes was a long and difficult task which could not be accomplished at a single meeting of the conference, and accordingly, after organizing the preparatory work, and appointing a commission to undertake the preparation of drafts the conference adjourned to meet again in June 1914.<sup>2</sup>

<sup>1</sup> An English translation of these treaties may be found in the Reports of the International American Congress (Washington 1890) pp. 876-933.

<sup>2</sup> For a full history of the codification movement in Latin America and the work of the various Pan-American Conferences in respect to codification see an article by Dr. Alvarez entitled *La Conférence des Juristes de Rio de Janeiro et la Codification du Droit International Américain*, in 8 *Rev. Gén.*, pp. 24 ff. See also the same author's book *La Codification du Droit International*, pp. 237 ff., and Calvacanti, *La*

The commission of jurists met and organized at Rio de Janeiro in June, 1912, since which time committees of delegates have been at work on the proposed codes. The significance of this assembly consisted not so much in the actual results accomplished, for they were largely only preparatory in character, but rather in the fact that for the first time a meeting of jurists representing practically all the governments of the western continent had assembled for the purpose of undertaking the preparation of codes of international public and private law for the states of the New World. The assembly was an official body, having been called in pursuance of a convention signed by all the states of America, which had therefore given their approval to the idea of codification. Thus America has taken the initiative in a movement, which, whatever may be the ultimate result, responds to an increasing sentiment and to modern tendencies in the development of the law.

Finally, it may be remarked that, at the Pan-American financial conference held at Washington in 1915, at which all the states of America except Haiti and Mexico were represented,

*Codification du Droit International Américain*, 21 *Rev. Gén.*, pp. 183 ff. On December 14, 1914, the governing board of the Pan-American Union adopted a resolution reciting that the European War had raised new problems in international law the solution of which was of equal interest to the entire world, that the form in which the operations of the belligerents were developing was resulting in injury to neutrals and that the principal cause of this result was due to the fact that the respective rights of belligerents and neutrals were not clearly defined. It was therefore resolved that a special commission of 9 members be appointed to study the problems raised by the European War and to submit to the governing board such suggestions as it might see fit and that in the study of questions of a technical character the commission should consult the board of jurists appointed in pursuance of the convention signed at the Third International American Conference on August 23, 1906. Later on during the war the United States Secretary of State, Mr. Lansing requested the American Institute of International Law to appoint a committee to study the problem of neutral rights and duties and to formulate "the principles underlying the relations of belligerency to neutrality rather than the express rules governing the conduct of a nation at war and a nation at peace."



an international high commission on uniformity of laws was created to devise means of adjusting and harmonizing the principles and procedure of commercial law and administrative regulation in the American republics and to endeavor to work out common solutions of legal problems in the business of banking and public finance. The commission consists of 19 national sections each composed of 9 jurists and financiers under the chairmanship of the minister of finance and will hold annual meetings.

The opponents of codification base their objections mainly upon the difficulties which stand in the way but there are still some jurists who are not convinced that it would be desirable even if it were practicable. It is quite true that the task of reducing to the form of a written code the rules of international law is a much more difficult undertaking than the codification by a single state of its own municipal law. The task of national codification involves little more than a systematic and authoritative statement of the law already enacted or accepted by the appropriate authorities of the state. The codification of international law, on the other hand, involves, in the first place, agreement among the whole body of sovereign states as to what the law is which it is proposed to codify. There is no common superior authority for determining the content of the law and endowed with power to impose it upon the body of states. There is no relation of legal superiority or inferiority; states are on a footing of legal equality and the law which governs their relations must be determined by them through common action or accepted by them, voluntarily. Furthermore, the mass of materials with which the international codifier must deal are wholly different in character from those with which the codifiers of municipal law have to deal. Instead of a tangible body of statutory law and a fairly definite body of judicial precedent the codifier of international law is confronted with a vast mass of opinion and practice, often conflicting, found in the books of text writers, in treaties, in the diplomatic correspondence of

different governments and in the decisions of national courts.<sup>1</sup> There being no international legislature or judiciary there is no international positive law or jurisprudence except such as may be found in international conventions and perhaps in the decisions of international arbitration tribunals. For these reasons, it is argued, the time is not yet "ripe" for the codification of international law; it is not sufficiently developed to be reduced to precise and definite rules; it is necessary, therefore, to wait until an international court and perhaps a legislative organ have been established the one to formulate the law and the other to interpret and develop it.

These objections, however, while serious enough are not insurmountable. The fact is, as I have shown, that a very considerable part of international law, especially the law of war, has already been codified, in the sense that it has been stated in precise and definite form and embodied in formal conventions. The practicability of codification has therefore been demonstrated and further progress does not necessarily require innovation but simply a continuation of the methods and processes already employed. Regarding that part of the law which has not yet been reduced to definite rules and embodied in conventions there is now substantial agreement upon the larger number of questions of fundamental importance. The problem of reaching an agreement upon the matters concerning which there is still

<sup>1</sup> See on this point an address by Mr. Elihu Root before the American Society of International Law in 1910 in 5 *American Journal*, pp. 577 ff.; also the report of the sub-committee of the same society on the history and status of codification, *Proceedings of the Society*, 1910, pp. 208 ff. See also Oppenheim, *International Law*, 3d edition, vol. I, pp. 44 ff., and Kuhn in *Procs. of the Second Pan-American Scientific Congress* (Vol. VII, pp. 283 ff.) who argues that codification in order to be effective must proceed hand in hand with the establishment of an international forum. A permanent international court of justice with appropriate jurisdiction would by its decisions undoubtedly contribute much to the development of international law and thus prepare the way for gradual codification. It has even been suggested that the gradual task of codification might be confided to the court. Compare Wehberg, *The Problem of an International Court of Justice*, pp. 12, 95.

a divergence of opinion and practice is not only not insurmountable but it can be easily solved if the nations really desire agreement. It has been argued that what is most needed is the establishment of an international court to which should be left the task of codification as it has been left to the courts of England and the United States to develop their municipal law. With such a court vested with defined jurisdiction there would be no need of a code of substantive international law.<sup>1</sup> This argument would be conclusive, however, only on the assumption that states would be willing to entrust to such a court the task of itself determining the law in all cases in which there is no law and in cases in which the law is uncertain. But this they are not yet willing to do. Most jurists consider that the establishment of an international court has accentuated rather than diminished the necessity for codification.<sup>2</sup> As is well known, both Japan and Russia in 1907 opposed the creation of an international prize court for the reason that the law which it was called on to apply was not codified, and it was to provide such a code that the naval conference at London was called. Mr. Balfour as a member of the council of the League of Nations opposed the proposal to give the permanent court of international justice compulsory jurisdiction mainly because international law was not codified.<sup>3</sup>

The very lack of an international court with power to make the law therefore rather increases than diminishes the necessity

<sup>1</sup> Compare Reeves, 15 *Amer. Journal*, p. 370.

<sup>2</sup> Compare Root (*Procs. Am. Soc.*, 1921, p. 12) who remarks that the establishment of a court and the "restoration of the authority of international law" are correlative parts of the same world policy and that there can be no real court without a law to control its judges. Compare also Lansing (13 *Amer. Journal*, 638) who declares that the adoption of an international code of principles for the guidance of an international court of justice is as essential as the creation of the court itself. See also the same effect, Woolsey in 13 *Amer. Jour.*, p. 204.

<sup>3</sup> *World Peace Foundation* pamphlet, "The First Assembly of the League of Nations," p. 111.

for codification.<sup>1</sup> In either case, therefore, whether there is or is not a court, the desirability of codification exists. Those who oppose codification on the ground that it would not be desirable, even if practicable, maintain that codification by putting the law into a straight jacket would interfere with its organic growth and natural development; and that a code once agreed upon would soon fail to respond to the rapidly changing conditions of the time and would therefore not be observed by the states which had given it their approval.<sup>2</sup> But the experience of countries which have codified their municipal law hardly supports this opinion in so far as it relates to the development of the law. In any case, the objection, if it is valid, may be obviated by periodic revisions of the international code and its progressive development through the addition of new rules to meet changed conditions and situations as they arise. In this way the Geneva Convention of 1864 was revised and improved and so were the Hague Conventions of 1899.

The number of jurists to-day who are opposed to codification on the ground that it is undesirable is comparatively

<sup>1</sup> Compare Oppenheim, *op. cit.*, p. 45 and Root in *Procs. Second Pan-American Scientific Congress*, vol. VIII, p. 209.

<sup>2</sup> Among earlier adversaries of codification may be mentioned Savigny, Holtzendorff, Bulmerincq, Bergbohm, Gareis, Schulze and Lorimer. Professor Zorn, a well known German jurist, thinks the attempt to codify international law is a waste of time. The proposal for the "codification of international law should be promptly and quietly set aside, for no practical man can take it seriously. The First Hague Conference did indeed 'codify' certain important points of international law, which, however, were very small ones in comparison with the whole subject; the Second Conference, which remained in session considerably longer failed to accomplish anything in this respect. And now it is proposed that the Third Conference shall undertake the codification of the entire body of international public law. There is no need of wasting words over these ambitious but visionary plans; for plans which propose impossibilities are absolutely of no use." This criticism, however, is not well-founded. Neither of the Hague Conferences was called for the purpose of undertaking the work of codification; but in fact, as Schücking remarks, (*op. cit.*, p. 200) they did codify a very considerable part of international law in the sense of arriving at agreement and embodying their decisions in conventions.

small. Many more do not favor the attempt because of the practical difficulties, but they recognize the advantages if only the difficulties could be overcome. Codification would give the law a precision, a definiteness and a certainty which it now lacks and if a sufficiently flexible method could be found for altering it from time to time so as to meet changing conditions and situations it is hard to see why codification would not be a benefit.<sup>1</sup> Mr. Elihu Root, one of the most eminent of American jurists, remarks that "there is but one way in which the weakness of international law can be cured and that is by the process of codification, a process which must extend through long periods, and which has already been going on very gradually for many years. The development of international relations in all their variety, in the multitude of questions that arise, goes on more rapidly than the development of international law; and if you wait for customs without any effort to translate the custom into definite statements from year to year, you will never get any law settled except by bitter controversy. We cannot wait for custom to lag behind the action to which the law should be applied."<sup>2</sup> A less well known American jurist remarks that "the most generally accepted conclusion appears to be that codification is desirable if the purpose be

<sup>1</sup> Naturally the desirability of codification is greater as regards certain branches of the law than in the case of other parts. It is generally admitted, for example, that the need of codification of the laws of war is more urgent than the codification of the law of peace. With the development and increasing resort to arbitration the need of a code of arbitral procedure has become highly desirable. See an article by Mr. W. C. Dennis in 7 *Amer. Journal*, pp. 285 ff. See also an address of Mr. Jackson Ralston in *Procs. Amer. Soc.*, 1908, pp. 115, who advocates the desirability of codification of the law relating to international claims. The law of intervention, as he points out, is in a most unsatisfactory condition; there are no rules of evidence governing the procedure of claims commissions, no agreement as to the law of succession, whether interest is allowable on claims, and to what extent the state is responsible for the acts of unsuccessful revolutions, etc.

<sup>2</sup> Address before the Second Pan-American Scientific Congress, *loc. cit.*, pp. 289-290. See also his address before the American Society of International Law, 1910, 5 *Amer. Jour.*, pp. 577 ff.

merely to obtain clearness and brevity and harmony for existing law; something more than the aggregations of a digest, but not enough to retard wholesome development." And he adds: "it would seem, therefore, that whenever the civilized nations by common understanding or by special agreement have decided that certain conduct is improper and will not be tolerated, the rules governing such a situation should be finally, clearly and definitely expressed in writing."<sup>1</sup>

According to the preponderance of juristic opinion to-day the question is largely one of scope and method rather than of desirability. Regarding the scope, some jurists maintain that the task of codification should be restricted to the mere formulation and statement of the existing rules of law, that is, the rules which are generally received and accepted. This was Austin's conception of codification which he limited to the "re-expression of existing law." Strictly speaking, this is all that codification implies, and restricted to these limits the task would be relatively simple although it would not constitute very great progress. Most jurists, however, when they advocate "codification" of international law, mean more than this. Mr. Root, for example, remarks that "the substantial work of international codification is not merely to state rules, but to secure agreement as to what the rules are, by the nations whose usage must confirm them." And he adds: "Except as a means to this end, any codification of international law can be of little value except as a topical index and guide to the student." "To codify international law is primarily to set in motion and promote the law-making process itself in the community of

<sup>1</sup> Address of Hon. Charles Nagel before the American Society of International Law, 1910, *Proceedings*, pp. 28-29. To the same effect see Oppenheim, *International Law*, 3d edition, vol. I, pp. 42 ff., Reinsch, *Procs. Amer. Soc of Int. Law.*, 1910, p. 37; report of sub-committee on codification, *ibid*, pp. 208; Nys, 5 *Amer. Jour.* pp. 577 ff.; Baldwin, *Procs. Second Pan-American Scientific Congress*, Vol. VII, pp. 279 ff.; Kuhn, *ibid*, pp. 283 ff.

nations."<sup>1</sup> In short, codification in this sense involves legislation as well as arrangement and co-ordination of rules.

Regarding the scope of the task to be undertaken, practically all the advocates of codification are agreed that it is not practicable to attempt at one time to embody within the limits of a code the entire body of international law. All are in accord that the process must take the form of partial codification, that, following the methods already adopted by the Hague Conferences, the law relating to particular subjects must from time to time be agreed upon and formulated in definite rules and that this process should be carried on until eventually the codification of the whole body of law may be accomplished.

The final question remaining is, by whom and according to what procedure should the drafts be prepared? The futility of Bluntschli's, Field's, and Fiore's efforts seems to justify the conclusion that no draft prepared by a single individual is likely to be accepted or seriously considered by the body of states. The initiative therefore must be undertaken by states

<sup>1</sup> 5 *American Journal*, p. 579. Compare also Reinsch who says "the international jurist ought, therefore, not to content himself with digesting and arranging those principles concerning which all controversy has disappeared. It is also his duty and function to extend the sway of law by showing that certain questions which are still viewed from the angle of political hostility are no longer vitally a part of the policy of national self preservation." *Procs. Amer. Society of Int. Law*, 1910, p. 37. See also Octavia's address before the Second Pan American Scientific Congress, *La Méthode pour la Codification du Droit International Privé* (*Procs., ibid*, Vol. III, pp. 34 ff.) who remarks that the work of codification consists not merely in the redaction of texts but in fixing principles. Oppenheim, who does not think the time is ripe to attempt codification which would involve reconstruction of the present international order and a recasting of the whole existing system of international law, nevertheless admits that codification would "in many points mean not only an addition to the rules at present recognized but also the repeal, alteration and reconstruction of some of these rules." *Op. cit.*, p. 46. Compare also Nagel (*Procs. Am. Soc.*, 1910, p. 29) who favors codification of international law in so far as its rules have been agreed upon but who thinks it would be dangerous to go further. Beyond that point, the development should be left to other agencies.

themselves; that is, it should be official and not private.<sup>1</sup> This is not saying that the work of learned societies and of eminent jurists acting upon their own initiative should not be encouraged. Mr. Root has declared that "the first Conference at the Hague would have been a complete failure if it had not been for the accomplished work of the Institute of International Law." The work which the Conference had to do "had been threshed out through the labors and discussions of the most learned international lawyers of Europe, including most of the technical advisers of the foreign offices, meeting in their private capacity. It would have been impossible for the Hague Conference to do that work or one tithe of it if they had not had the material already provided."<sup>2</sup> The valuable work of the national maritime societies and of the international maritime committee in formulating the rules of maritime law in respect to collisions, assistance, salvage and safety at sea which have recently been embodied in international conventions is another striking example for the service which private associations are capable of rendering. The International Maritime Committee was able

<sup>1</sup> Compare Nys in 5 *Amer. Journal*, p. 898, who remarks that the undertaking must be vested with a public character; it is the governments which ought to accomplish the task.

<sup>2</sup> It should be remarked, however, that the methods of procedure of the London naval conference were somewhat different from those of the Hague Conferences, in that each government represented prepared in advance a memorandum setting forth its views on each matter listed on the program. These memoranda constituted the bases of the discussions of the conference. This method of procedure marked a distinct improvement upon that of the Hague Conferences and it facilitated and simplified considerably the work of the conference. Compare Alvarez, *La Codification*, pp. 263 ff. The work of some of the more recent Hague conferences on private international law was much facilitated by means of *questionnaires* sent to the various governments in advance and to which replies were made setting forth their views on the different questions to be discussed. In some instances also several governments appointed commissions in advance to elaborate a program and to perform the other necessary preparatory work. Dr. Alvarez has examined and commended this procedure as being both simple and efficacious. *Op. cit.*, pp. 265 ff.



to bring about the meeting of official diplomatic conferences which concluded conventions embodying, in the main, the rules which it had formulated, but it is rare that private organizations succeed in inducing governments to take up their projects. There is an advantage therefore in having the necessary preparatory work undertaken by an official body designated by international authority which should take the initiative.

The two methods of procedure which commend themselves most favorably to the advocates of codification are: (1) codification direct by international conferences without the cooperation of private jurists or associations, and (2) codification by committees of jurists or scientific societies whose work shall be submitted either to an international conference or directly to the various governments, which must ultimately pass upon the projects thus submitted. The first method is that which has heretofore been followed by the Paris, Hague, Geneva, London and other international conferences. It possesses one disadvantage, however, owing to the fact that international conferences are usually too large and unwieldy for efficient action and their duration too limited to secure the long and careful consideration which the work of codification requires. Moreover, the members of such conferences are likely to be diplomats or political men rather than technicians and experts in international law. The materials and the technical information should therefore be assembled and prepared in advance and worked into a draft, by a smaller and more competent body. In this way Lieber's Instructions served the Brussels Conference of 1874 and the Hague Conference of 1899; the draft projects of the Institute served both the Hague Conferences; and the drafts prepared by the International Maritime Committee served the conferences of 1905 and 1909. This is the method advocated by Mr. Root, Judge Baldwin, and other jurists. They are of the opinion that this preparatory work should be undertaken by scientific societies like the Institute of International

Law rather than governmental commissions, because in that case it is more likely to be the work of scholars who will be free from official restraint.<sup>1</sup> The necessity of this preliminary work was recognized by the Second Hague Conference which accompanied its recommendation for a third conference with the suggestion that two years before the meeting of the conference a preparatory committee should be appointed by the various governments to collect the proposals to be submitted to the conference, to determine what subjects were ripe for international regulation and of preparing a program for the careful examination of the different governments. This was the idea of the Interparliamentary Union which at its meeting in London in 1906 recommended the appointment of a permanent consultative committee to prepare the draft of a code of international law. It is advocated by the German jurist Schükung who suggested that the members of the international preparatory committee recommended by the Second Hague Conference should bring with them to the next conference instructions from their respective governments and that in the formulation of these instructions eminent jurists should at least be given a hearing. If they are prepared by officials of the foreign offices alone they

<sup>1</sup> Mr. Root thus states his view of the proper procedure: "Now as heretofore the work of preparation must be done chiefly upon private and unofficial initiative. Codifiers must draft and systematize and clarify. Associations must discuss and obviate objections and reconcile the philosophical and the practical and work out conclusions and educate opinion." 5 *Amer. Journal*, p. 588. Again he says: "So I think it is quite clear that the process of codification, step by step, subject by subject, point by point, must begin with the international labor of private individuals and it must be completed by the acceptance of governments." *Procs. Second Pan American Scientific Congress*, Vol. VII, p. 290. Judge Baldwin says: "I believe that...a committee of a scientific academy or association of recognized merit is more likely to achieve success than a commission constituted by public authority.... A public commission is more likely to be constituted of statesmen than of scholars; more likely to be constituted still of politicians than statesmen." *Ibid*, p. 282. Compare also Roszkowski in 21 *Rev. de Dr. Int.*, 530, who advocates the preparation of the project by a commission of jurists.

are too likely to represent only the special interests of their respective states. In short, legal science should co-operate with diplomacy with a view to affecting a compromise between national and international views and interests.<sup>1</sup> The procedure adopted by the Pan American Assembly of jurists in 1906 is to be commended. Instead of undertaking itself the preparation of the codes of international public and private law for which it had been called into existence it designated committees of jurists to prepare draft projects to be submitted to the assembly at a future meeting. Many years of labor and discussion will be required to elaborate the drafts which are to be ultimately submitted to the assembly and to the governments of the states under whose auspices the initiative has been taken.

There is some sentiment in favor of entrusting the task of codification, especially of the laws of war, to the League of Nations.<sup>2</sup> But this proposal has been criticized on the general ground that no fixed code of rules of warfare drawn up by the League of Nations in one year would be suitable to the changed conditions ten years hence, and in consequence they would not be observed by belligerents.<sup>3</sup> As yet the council and the assembly of the League have shown little interest in the matter

<sup>1</sup> See his *The International Union of the Hague Conferences*, (p. 205), being an English translation of the author's work *Der Staatenverband der Haager Konferenzen*, published by the Carnegie Endowment for International Peace (1918).

<sup>2</sup> See the proposal of Mr. F. N. Keen in 5 *Grotius Society Transactions*, p. 100, and the suggestions attributed to Lord Phillimore and Mr. Winston Churchill, *Brit. Yr. Book of Int. Law*, 1920-21, p. 110.

<sup>3</sup> See a remarkable article (unsigned) in the *British Year Book* (pp. 109 ff.) cited in the above note, where the author combats the general principle of the codification of the laws of war for the reason that no rules agreed upon could have any degree of permanency, and that it is "worse than useless" to attempt to regulate the conduct of war by means of formal rules. In the opinion of the author the task which the League of Nations ought to undertake is rather the "building up of a new body of international law for time of peace." This would contribute powerfully toward the removal of the causes of conflict and thereby diminish the number of wars in the future.

of codification. The advisory committee of jurists which drafted the statute of the permanent court recommended the calling of a conference as soon as practicable for the purpose of, "restating the established rules of international law, of formulating and agreeing upon the amendments and additions, if any, to the rules made necessary by the events of the late war and the recent changes in the conditions of international life and of endeavoring to reconcile divergent views in respect to rules concerning which there is dispute." The only action taken by the council was the adoption of a report to the effect that the permanent court should be requested to consider what subjects might be included in the program of such a conference and to report to the council which would then submit the list of subjects to the various governments for their consideration.<sup>1</sup> In the assembly Lord Rober Cecil opposed the proposal on the ground that "we have not yet got to a stage where it is desirable to consider the codification of international law."<sup>2</sup>

In conclusion it would seem that the codification of international law is not only desirable but, within certain limits, it is entirely practicable. The achievements already accomplished demonstrate the truth of both propositions. It is probably too much to expect that the entire body of the law will ever be formulated and stated in precise rules, certainly not at once. The method already followed of partial and gradual codification, with complete codification as the ultimate goal, would seem to be the more practicable. In the accomplishment of this task commissions of jurists and scientific bodies should be utilized to furnish the materials and perform the necessary preparatory service which all intelligent codification requires, leaving to inter-

<sup>1</sup> *Official Journal of the League of Nations*, Nov.—Dec., 1920 (No. 8) p. 20.

<sup>2</sup> *W. P. Foundation* pamphlet, July 1921, "The First Assembly of the League of Nations," p. 114.

national conferences the task of reconciling differences, of finding solutions and of reaching agreements.<sup>1</sup>

The late Professor Fiore, who rendered distinguished service to the cause of codification and whose opinion is entitled to great weight, thus states the problem and the outlook: "It is our firm belief that, in the international society, force will cease to exercise absolute preponderance, and will be replaced by the authority of law. But we also believe that this end will be better attained by proceeding cautiously and being guided by favorable circumstances. It would be an exaggeration to conceive the idea of codifying international law in its entirety. It will be possible indeed to effectuate the codification of such matters on which common legal convictions have been formed and to wait until civilization, progress and the community of commercial relations make possible the codification of new subjects of common international interest. Every new step will be a conquest tending to assure the sovereignty of law in the world; but it will be necessary to wait until the precious fruit is ripe, and it will always be necessary to proceed gradually." *International Law Codified*, p. 79.

## LECTURE XV

### The Reconstruction of International Law

In this, my last lecture, I purpose to consider some of the effects of the World War upon international law and to point out some of the modifications that seem to be desirable or necessary in consequence of the new and changed conditions under which wars in the future will be carried on.

Throughout and following the close of the late war the assertion was frequently made, sometimes by jurists and statesmen of high repute, that international law had been "destroyed," had "broken down," its rules reduced to "scraps of paper," and the like.<sup>1</sup> Sometimes the obituary thus pronounced was limited to the laws of war, sometimes it was pronounced in language so sweeping as to apply to the whole system of international law. Having been destroyed it must now be rehabilitated or rebuilt on new foundations. In consequence of this opinion, a flood of books and articles has appeared on the "reconstruction," the "reconstitution," the "renovation" of international law, the "future of international law," the "new international law," and similar subjects.<sup>2</sup> Nearly every great

<sup>1</sup> Compare Alberic Rolin, *Les Fosseurs du Droit de la Guerre*, 26 *Rev. Gén.*, p. 129.

<sup>2</sup> See, for example, Jitta, *La Rénovation du Droit International* (1919); Alvarez, *Le Droit International de l'Avenir* (1916); also his article *Le Nouveau Droit des Gens*, in *Rev. de Droit. Int.*, 1920, pp. 149 ff.; Fauchille, *Le Droit International de l'Avenir* (Part VI of his *Droit International Publique*); de Oliveira Lima, *The Reconstruction of International Law*, in *Procs. Am. Soc. of Int. Law*, 1921, pp. 14 ff.; Kohler, *Das Neue Völkerrecht*, in *Zeitschrift für Völkerrecht*, Sept., 1915; Liszt, *The Reconstruction of International Law*, in *Penna. Law Review*, June, 1916, pp. 765 ff. (originally published in the *Deutsche Juristen-Zeitung* of Jan. 1, 1916); Garner, *La Reconstitution du Droit International*, in *Rev. Gén.*, 1921, pp. 1 ff.; Woolsey, *Reconstruction and International Law*, in 13 *Amer. Jour.* pp. 187 ff.; de Louter, *La Crise du Droit International*, in 26 *Rev. Gén.*, pp. 76 ff.; and Rolin, *Les Fosseurs du Droit de Guerre*, *ibid.*, pp. 129 ff.

war in the past has been followed by opinions of this kind ; they were especially numerous and pronounced at the close of the Napoleonic Wars and they will probably not be less lacking at the close of future wars. Those who indulge in the sweeping assertion that international law was destroyed by the events of the World War ignore, in the first place, the distinction between that part of international law which has to do with the conduct of war and that other large part which deals with the relations of states in time of peace. The latter part of the law was not destroyed or even seriously menaced by the events of the World War, and upon the conclusion of peace its sway was resumed unassailed and unaffected.<sup>1</sup> Moreover, the view that the other part of international law—that part which we call the law of war—was destroyed, represents a hasty judgment for which there is no real foundation. As a matter of fact, one of the avowed reasons which animated the states which took up arms against Germany and her allies was the determination to defend and maintain the law which Germany was charged with disregarding and seeking to destroy. Their triumph over Germany removed, therefore, all reason for the assertion that the law of war was destroyed by the events of the conflict ; only in case Germany and her allies had succeeded would there have been any basis for the claim that international law was destroyed.

Throughout the War, no belligerent—not even that one which was most often charged with deliberate and flagrant violations—ever denied the existence of international law or the binding force of its rules. There were, of course, many controversies as to what the law required or prohibited, there were divergencies of interpretation, there were disputes as to whether particular conventions were binding in consequence of their non-ratification by certain belligerents, there were differences of opinion as to the applicability of certain rules to the

<sup>1</sup> Compare Munro Smith, "The Nature and Future of International Law," 12 *Amer. Pol. Sci. Review*, p. 9, and von Liszt, "The Reconstruction of International Law," 64 *Penna. Law Review* (1916), p. 765.

use of new instruments and agencies and to new situations resulting from changed conditions, but there were no denials by any party of the binding force of the law in cases where its applicability was admitted. Whenever a belligerent was charged with violation of the law, it was quick to justify its conduct, usually by an appeal to the law itself. If the act charged was admitted, the accused belligerent denied that it was forbidden by the law, for one reason or another, or asserted that the violation was justifiable on the ground of self-preservation, or as a legitimate act of reprisal for the unlawful conduct of the other party, and usually each party made an appeal to the public opinion of the world by publishing the facts of its case in the hope of obtaining a favorable verdict. Even the German government went to the length of asserting that its army and navy had, throughout the war, "observed all the principles of international law and of humanity,"<sup>1</sup> and a well-known German jurist declared that his country from first to last "observed international law in all its vital aspects and had daily proven its validity."<sup>2</sup>

There were, of course, numerous violations of the law—some of them flagrant and shocking; no belligerent was entirely guiltless, though naturally some were more frequent offenders than others,<sup>3</sup> but it may be doubted whether, considering the number of belligerents, the number of persons under arms and the vast area of military and naval operations, the violations of

<sup>1</sup> See the German note of June 10, 1916, to the British government, relative to the *Baralong* affair. Compare also the German note of July 8, 1915, to the government of the United States.

<sup>2</sup> Zitelmann, *Haben wir noch ein Völkerrecht*, in the *Preussische Jahrbücher* for Oct.-Dec., 1914, pp 472 ff. Compare also Liszt in the *Frankfurter Zeitung* of Oct. 29, 1916, reproduced in Clunet, 1917, pp. 911 ff.

<sup>3</sup> The Peace Conference Commission on Responsibility of the Authors of the War charged Germany and her allies with having committed 32 different varieties of crimes and violations of the laws of war. The Germans and their allies naturally charged their enemies with having committed numerous acts in violations of the laws of war.



the law were proportionately in excess of those in former wars. In any case, admitting that there was a more general disregard of the rules than was ever known in any previous war, that constitutes no reason for the extreme assertion that the system of international law was destroyed. It is quite true that its foundations were rudely shaken and its value was discredited, at least in the minds of some persons; its defects and weaknesses were revealed in a more striking degree than ever before, but as a system it was no more destroyed by the late war than the criminal law of a given community may be said to be destroyed by an outbreak of crime therein. As Sir Frederick Pollock has justly remarked: "Law does not cease to exist because it is broken, or even because, for a time, it may be broken on a large scale."<sup>1</sup> And as it usually happens that a period of lawlessness in a particular community is followed by a greater appreciation of the value of law and an aroused determination to strengthen and enforce it, so it may be assumed that the blow which international law received during the World War will be followed by increasing efforts to rehabilitate and strengthen it, in order that it may better subserve the common interests of states and the welfare of mankind.<sup>2</sup> The late Mr. W. E. Hall in the preface to the third edition of his treatise on

<sup>1</sup> See his introduction to Phillipson's edition of Wheaton's *International Law*, p. lx. Sir Thomas Barclay observes that "To say that international law is dead is about as true as to say that an inundation or an earthquake puts an end to engineering or architecture." *Collapse and Reconstruction* (1919), p. 188.

<sup>2</sup> Compare Hill, *The Rebuilding of Europe*, pp. 57-58; de Louter 26 *Rev. Gén.*, p. 76; and von Liszt, art. cited. Sir Thomas Barclay, (*op. cit.*, p. 189) points out that a number of great wars during the nineteenth century were followed by active and effective agitation in favor of further development of the law of nations. Thus the Italian War of Liberation led to the Geneva Convention and the Red Cross movement and the Franco-German War of 1870 led to the founding of the Institute of International Law and the Society for the Reform and Codification of the Law of Nations (now the International Law Association), and eventually of the Hague Conferences.

"International Law," written twenty-five years before the outbreak of the World War, described with the vision of a prophet the character of the "next great war"—a war in which "whole nations would be in the field" and whose conduct would "certainly be hard" and perhaps "unscrupulous," but, adverting to the fact that wars in which international law has been seriously disregarded have generally been followed by periods of penance and the assumption of stricter obligations, he added: "There is no reason to suppose that things will be otherwise in the future. I, therefore, look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist." Already the establishment of the League of Nations, one of whose declared objects is the promotion of international co-operation and the achievement of international peace and security, among other means, by the "firm establishment of the understandings of international law," the creation of the Permanent Court of International Justice, and the recent conclusion of various important international conventions of a law-making character, all furnish evidence of a determination to go forward with the work of preserving and strengthening the system of international law.

Nevertheless, while few or no persons now seriously contend that the system of international law was destroyed by the World War, all are agreed that it revealed the existence of changed conditions and produced effects which make desirable or necessary various modifications of and additions to the law as it was generally received and accepted before the War. Most of the great wars of the nineteenth century were in fact followed by revisions of certain of the rules of warfare. So far as the changes that have been made necessary or desirable by the World War are concerned, they are changes not so much of fundamental principles as the adaptation of the existing rules to

new conditions.<sup>1</sup> As I have pointed out in a previous lecture, the World War was distinguished from all others of the past, not only by its vast magnitude, but by the large number of new instrumentalities, agencies, and methods of destruction which were employed for the first time, or for the first time on a considerable scale. The most important of these new inventions were the submarine torpedo boat, the submarine mine, the aeroplane and the dirigible, the long range cannon, and various poisonous and toxic gases. Other new inventions, such as wireless telegraphy and the telephone, also played an important part in the war, though not as instrumentalities of destruction. There is no reason, however, why the introduction and use of such weapons should require any fundamental modification of the existing rules regarding the means which a belligerent may employ for injuring his enemy.<sup>2</sup> The old rules, rightly interpreted, apply equally to new inventions as to those which were in existence when the rule were originally formulated. Those rules condemned the employment of any and all weapons which the enlightened sentiment of the age considered inhumane, and it is not necessary to alter the law to make it apply to newly invented weapons. It may be advisable, as the Washington treaty of 1922 does, to condemn formally the use of specific weapons or agencies, such as the submarine as an instrumentality for the destruction of merchant vessels and the employment of poisonous gases and chemicals as means of attack, but it ought not to be necessary, for they have already long been condemned by what President Wilson called the sacred principles of humanity.

It was not so much the invention of new instruments and agencies of destruction, as the existence of the changed conditions which the war revealed in so striking a manner, that has made necessary modifications in the existing rules in order that

<sup>1</sup> Compare Lansing in 13 *Amer. Journal*, p. 638.

<sup>2</sup> Compare Higgins, *British Year Book of International Law*, 1920-21, p. 160.

they may be adapted to the new conditions. The war clearly demonstrated that some of the old rules were unreasonable and illogical when applied to these new conditions; that others were inadequate and ineffective; that others were obsolete or nearly so; and that as to others there were no rules at all. The old rules, as I said in a previous lecture, endeavored to distinguish between the rights of the armed forces who participate directly in military or naval operations and the unarmed civil population which remain at home and take no part in the fighting. The distinction was based on the humanitarian philosophy of the modern age that war should be, in the main, a contest between the opposing armed forces of states rather than between their populations as a whole. An endeavor was made to relieve the non-combatant civil population as much as possible from the hardships and consequences of war and to direct the measures employed to overcome the enemy against his armed forces alone. The nationals of the enemy who were found in the territory of the other belligerent at the outbreak of the war were rarely molested; with a few exceptions they were never arrested, interned, treated as prisoners of war, or expelled. Aside from being subjected to the surveillance of the public authorities they were usually left the same liberty as the nationals of the state in which they happened to be. Again, the rules relating to trade in contraband made a distinction between goods which were used exclusively for war-like purposes and those which were at the same time susceptible of use by the non-combatant population for civil purposes; that is, between what is usually denominated absolute contraband and conditional contraband, and the liability of the two classes of goods to capture was determined by different rules. Absolute contraband was liable to capture if it was destined to any place in the enemy country, but conditional contraband was not liable to capture unless it could be shown that it was destined for the use of the government or armed forces of the enemy. The difficulty lay in determining whether in a given case the goods were destined for the use of the one or

the other and the tests laid down, at least by the Declaration of London, were not satisfactory. The rules of the Declaration were based on the assumption that if conditional contraband were consigned to a government contractor or agent in the enemy country or to a naval port, a fortified place, or a port which served as a base of military operations, they would find their way to and be used by the armed forces; but that if they were consigned to a commercial port they would be used only by the civil population. Consequently, conditional contraband goods with the former destination were liable to capture, while those with the latter destination were not. Now, the World War clearly showed that the destination which the old rules made in this respect, always more or less arbitrary, were, under the new conditions, largely impracticable and indeed illogical.<sup>1</sup> The World War was not far advanced before it was found, for example, that various articles which had never been regarded as contraband at all were in fact absolute contraband, and they were so declared.<sup>2</sup> Many articles, such as foodstuffs, coal, various chemicals, and many others, which have heretofore been classified as conditional contraband; and which, in the absence of a blockade, were allowed to be transported to the enemy country, if intended for the use of the civil population, are as essential to the prosecution of war to-day as guns and munitions. Why, therefore, attempt to distinguish between the two classes of goods, when they are of almost equal importance to a belligerent in carrying on war? The distinction which has heretofore been made between conditional contraband destined to naval ports, fortified

<sup>1</sup> Compare Sir Erle Richards in the *British Year Book of International Law*, 1920-21, p. 17.

<sup>2</sup> Admiral Stockton calls attention to the fact also that the conditions of modern warfare as shown by the late World War have reduced the list of articles heretofore regarded as non-contraband to such insignificant proportions that they "constitute but a meager collection with an uncertain future." In consequence, the principle of "free ships, free goods" now means little. See his article on "The Declaration of Paris," in 14 *Amer. Journal*, p. 363.

places, bases of operations, and government agents, and that destined to commercial ports and private consignees is still more illogical, because consignments of the latter class may be easily re-forwarded from a commercial port to a port constituting a base of operations or sold by the private purchaser to a government agent or requisitioned by the government, and in either case used by the government for military purposes. The conditions under which the World War was carried on revealed, in a striking manner, the inconsistency of these distinctions and the inadequacy of the rules upon which they were founded. They showed that wars to-day can no longer be regarded merely as contests between the armed forces of the opposing belligerents, but that they are struggles between nations and peoples in which the civil population as well as the armed forces indirectly participate. This fact especially distinguished the World War from those of the past. Millions of men and even of women who, under the old rules, were regarded as innocent non-combatants, worked in munitions factories and other establishments for the production of war materials, in shipyards, in mines and quarries, and in government offices, in one capacity or another, with the one supreme object of winning the war. Thousands of women were sent to the front as cooks, drivers, store-keepers, etc., to take the places formerly filled by soldiers. Their services were as important and as essential as the soldiers in the field or the seamen on the battle-ships. In effect, the German doctrine of the "nation in arms" became an established fact. Some governments, notably that of Germany, assumed control of the distribution of foodstuffs, so that the civil population was almost as dependent upon the government for its food supply as was the army. Under these conditions the distinction which the old rules relative to the carriage of contraband sought to make between the military and the civil population ceased to have any practical value, and the rules were disregarded. The British authorities took the view, and it was logical enough, that in the presence of a situation in

which the enemy government had taken over the control and distribution of the food supply of the country and where almost the entire population was engaged directly or indirectly in the struggle, it was no longer possible to distinguish between the armed forces and the non-combatant population, and that if supplies were permitted to go to the latter, they would be seized by the enemy government and used for feeding the army.<sup>1</sup> In any case, whether they ever reached the army or not, they would be used for the sustenance of a civil population, a large part of which was engaged in war work of one kind or another. Under these circumstances there was neither logic nor reason, even if it were possible, for attempting to preserve the distinction between enemy destination and enemy use. In consequence, most writers are now agreed that the events of the World War have gone far toward undermining the foundations of the distinction heretofore recognized between the so-called combatant and non-combatant population.<sup>2</sup> In fact the distinction was respected during the late war only within restricted limits. As I have pointed out in a previous lecture, the enemy

<sup>1</sup> Compare the views of Sir Erle Richards, *loc. cit.*, p. 19; also the conclusions of Hyde (*International Law*, vol. II, p. 596) who, speaking of the attempt to distinguish between foodstuffs intended for military use and those intended for the civil population, remarks that it is a probability, rather than a possibility, that such articles imported into belligerent territory will be used for military purposes and that it may be doubted whether, under such conditions as existed in Germany during the World War, the necessary showing as to non-military use can be made.

<sup>2</sup> See on this point Lansing in 13 *Amer. Journal*, p. 638; Lawrence in II. *Grotius Society, Probs. of the War*, p. 108; Phillimore, *ibid.*, Vol. IV, p. 60; Sir Graham Bower, *ibid.*, Vol. V, pp. 76 ff.; (see also his address in the 30th *Int. Law Assoc. Report*, 1921, vol. I, pp. 163 ff.); Hall, *ibid.*, vol. V, p. 83; Oppenheim, *Int. Law*, 3rd ed., vol. II, p. 73; Sir Erle Richards, art. cited above, especially pp. 13 & 19; Fauchille, *Droit Int. Public, Guerre et Neutralité*, pp. 1061-62. Sir Walter Phillimore remarks that it is idle to treat war as a mere duel between the armed forces of the belligerents and that the more nearly it approaches the idea of a duel the more it encourages the maintenance of great standing armies and navies, and the severer becomes the competition in time of peace until economic exhaustion supervenes. *Three Centuries of Treaties of Peace*, p. 169.

alien population, civil and military, men and women alike were interned and virtually treated as prisoners of war, they were deprived of all control over their business undertakings, and their property was seized and sold, and the proceeds applied to the settlement of national claims, so that it amounted, in effect, to confiscation. Commercial blockades were established, the purpose of which was to starve the civil population of the enemy into submission. Food stuffs and other articles intended for the sustenance of the enemy civil population were treated as absolute contraband and excluded equally with arms and munitions. Airships flew far beyond the theater of military operations, attacked towns and cities inhabited only by civilians and destroyed private houses and institutions and with them the lives of many non-combatants. Naval vessels bombarded undefended coast towns and villages under similar circumstances and with similar results. Submarines sank without warning hundreds of peaceful merchant vessels, enemy and neutral alike, and drowned thousands of unoffending non-combatants, men, women, and children. The civil population of occupied territories was pillaged, subjected to unprecedented requisitions and contributions, deported by the enemy to distant regions, or to his own country and compelled to work, for him.<sup>1</sup> Some of these acts were committed only by certain belligerents and were admittedly contrary to the generally accepted laws of war and cannot therefore be invoked as precedents in support of an argument that the distinction between the rights of combatants and non-combatants has broken down; but others were committed by all belligerents on both sides and were considered as

<sup>1</sup> M. Fauchille remarks that, while the tendency during the nineteenth century has been to regard war more and more as a relation of state to state, rather than a relation of individual to individual, the practice during the World War marked a revival of the ancient principle of barbarous ages that war must be directed not only against the military forces of the adversary, but against all his subjects, even the peaceable and the unarmed population. *Droit. Int. Pub., Guerre et Neutralité*, p. 1061.



legitimate measures of war. Whether such treatment of non-combatants was lawful or unlawful, it undoubtedly indicates a tendency in the direction of throwing overboard the traditional distinction between those who wear uniforms and fight in the ranks and those who remain at home and take no part in the war at all or take only an indirect part. And the prediction is now being made that the wars of the future will more than ever be contests between the whole people on each side and that the so-called non-combatant population will have to accept their share of the "inhumanity."<sup>1</sup> This would seem to be a necessary consequence of the new and changed conditions under which future wars will be carried on and the rules of international law will have to be altered so as to adapt them to these conditions. It is not to be assumed, however, that the distinction between combatants and non-combatants will be entirely swept away. So far as the distinction is founded on considerations of humanity, universally recognised, it must be preserved. The new and changed conditions to which I have referred may justify "starvation blockades," the treatment of the enemy alien civil population as prisoners and the confiscation of their property and the abolition of the distinction between absolute and conditional contraband, but it does not follow that the civil population which remains at home and takes no direct part in the war may be attacked equally with the armed forces in the field or drowned while they are peacefully traveling on unoffending merchant vessels. It is not believed that the world is prepared to go to such lengths in doing away with the ancient distinction. For this reason, submarine warfare against merchant vessels, at least so long as submarines are not provided with facilities for taking care of the crews and passengers on the vessels which they destroy, ought to be outlawed by the world as it has been outlawed by the

<sup>1</sup> Compare to this effect the remarks of Rear-Admiral S. S. Hall, of the British Navy, in *V. Grotius Society Transactions*, p. 83.

states which have approved the Washington treaty of 1922. For the same reason, the naval bombardment without warning of undefended coast towns inhabited only by peaceful civilian populations and the indiscriminate bombardment by air craft of dwelling houses, institutions, towns, and villages situated far beyond the theater of military operations and occupied entirely by non-combatants, must be condemned. Any rule which undertakes to assimilate the civil population and the armed forces to this extent would violate an ancient distinction founded on a conception of humanity which the modern world cannot be expected to repudiate, merely because conditions have changed and new instruments of destruction have been invented.

As the new conditions referred to above will probably lead to a modification of the old rules which attempted to distinguish between absolute and conditional contraband and between consignments of conditional contraband intended for military use and those intended for the use of the civil populations, so they will probably lead to the general acceptance of the so-called doctrine of continuous voyage or ultimate destination, at least as applied to belligerents circumstanced as Germany was during the World War. The old rule which made the destination of the ship, rather than that of the goods, the test of the liability of the goods to capture was reasonable enough under the conditions of the time when the rule was formulated, but with the development of railway and other methods of land transportation, which rendered it as easy for a belligerent to obtain oversea supplies through the medium of nearby neutral ports as if they were landed directly in his own ports, the rule no longer sufficed. The events of the World War demonstrated the futility of the attempt to distinguish between direct trade between a neutral and a belligerent port and indirect trade between the same ports through the medium of an intermediate neutral port. Goods shipped from America to neutral ports in Denmark and the Netherlands were purchased by German agents and forwarded across the frontier into Germany for the

use of the German armies, whom they reached as quickly as if they had been landed at Hamburg or Bremen. To allow a belligerent to intercept such traffic in the latter case, but not in the former, is to make the mode of transportation or the character of the voyage, rather than the destination of the goods the test of their liability to capture. If belligerents are to be allowed the right to intercept on the high seas the transportation of contraband goods, intended for the use of the enemy, both logic and reason would seem to require that they should be allowed to intercept those whose ultimate destination is the enemy equally with those destined immediately and directly to an enemy port, otherwise the right will be of little value to a belligerent whose enemy is a continental state surrounded wholly or in part by neutral territory, through whose ports the enemy may be able to draw unlimited supplies. This is not saying that a belligerent should be allowed to interfere with goods intended for use or consumption in the neutral country to which they are consigned. The burden of proof ought, in such cases, be placed upon the captor to show that the ultimate destination is really enemy territory, except perhaps where the consignees in the neutral port are mere "dummies" or notorious agents of the enemy, rather than established *bona fide* merchants. On the other hand, there would seem to be no good reason why the captor upon whom the burden of proof is thus placed should not be allowed to produce extrinsic evidence before the prize court, that is, evidence in the form of telegrams, letters, and other papers than those found on the vessel.<sup>1</sup>

It would seem also that the right of captors to take their prizes into port for the purpose of conducting more thorough searches than is often possible at sea, in view of the conditions which I described in a previous lecture, must be admitted. The World War demonstrated clearly that, unless this right is allowed,

<sup>1</sup> Compare Richards, article cited above, p. 22.

it will often be impossible to ascertain the true character of suspected cargoes.<sup>1</sup> It must be admitted also that "probable cause" or reasonable suspicion will justify the taking-in of a vessel. But in case the search fails to reveal the presence<sup>2</sup> of contraband the captor ought to bear the expense of detention and indemnify the owner or consignee for any losses sustained in consequence of the diversion and detention of the ship. Moreover, the conditions under which search may be exercised ought to be defined with more precision, so as to remove as far as possible the cause of frequent controversy. What is even more desirable, the inconveniences, losses, and sources of controversy should be entirely removed by some system of official certification by which the necessity of search could be obviated. It would seem to be entirely practicable to allow the consul of a belligerent power in a neutral port of departure to inspect the cargo before the sailing of the vessel and to furnish the master with a certificate to the effect that the cargo contains no contraband. The exhibition of this certificate to the captor should then relieve the vessel from search. If such a procedure were adopted, harassing searches and seizures at sea, diversions and long detentions in the captor's ports would be heard of no more, and many irritating controversies between belligerents and neutrals would be avoided. This procedure has often been proposed and it found a place in the proposed code of the rights and duties of neutrals adopted by the American Institute of International Law in 1916. It has, of course, been argued that the system of certification would not protect belligerents against fraudulent augmentation of the cargo at sea subsequent to the sailing of the vessel, and it must be admitted that this would be possible, but after all, the possible injuries to belligerents from occasional

<sup>1</sup> Compare the remarks of Admiral Stockton, who calls attention to the "almost insurmountable difficulties" for examining at sea "large vessels with their great and complex cargoes"—a difficulty which has been increased by the growth of the international parcels post service. See his article in 14 *Amer. Journal*, p. 363.

fraudulent augmentations of cargoes at sea, would not be equal to the inconvenience and losses of which neutral commerce would be spared.

It is probably safe to say that the majority of the irritating controversies which arise in every maritime war between belligerents and neutrals are connected with trade in contraband, and this fact has accentuated the feeling that the existing rules relating to such traffic should be radically altered with a view to diminishing the number of these controversies. Some writers, such as Kleen, Woolsey, and Hautefeuille, have proposed that neutral powers should forbid their nationals from engaging in contraband trade, especially in arms and munitions, and occasionally governments have adopted this policy, but it has not met with general favor.<sup>1</sup> As is well known, the British delegation at the Second Hague Conference went to the opposite extreme of proposing that all restrictions on the trade in contraband be removed and that the carriage of contraband goods to the enemy be freely permitted except where prevented by blockade. This proposal actually received the votes of twenty-five states represented at the conference. A more moderate proposal, and one which had the approval of the American government, is the abolition of the principle of conditional contraband. This reform was also recommended by the Institute of International Law in its *avant-projet* adopted at Venice in 1896.<sup>2</sup> But since the distinction between the two classes of contraband has largely disappeared, it is doubtful whether such a proposal would be the best solution of the problem. Whatever solution is adopted, one thing is clear: the old rules are far from satisfactory and should be altered in some way to remove the existing sources of controversy and at the same time to reconcile

<sup>1</sup> This matter is considered more at length in my *International Law and the World War*, Vol. II, Sec. 508a.

<sup>2</sup> Both of these proposals are discussed by Butte in *Procs. of the Amer. Soc. of Int. Law*, 1915, pp. 115 ff. See also the remarks of General Davis, *ibid*, 1907, pp. 87 ff.

in a just manner the conflicting interests of belligerents and neutrals.

In this connection, it may be observed that the irritating controversies that occurred during the World War between Great Britain and various neutral governments relative to belligerent interference with mails on neutral steamers revealed the existence of serious divergencies of opinion concerning the rights of belligerents in this respect. The removal of both letter and parcels mail from neutral steamers at sea, the taking of them into a home port for examination, the subjecting of them to a rigorous censorship, and the forcing of neutral mail steamers to enter belligerent ports where they were subjected to the local jurisdiction, were the subject of vigorous protests, and it was denounced as a "lawless practice" which caused grave inconveniences and ruinous losses to business men in neutral countries.<sup>1</sup> The existing rules of the Hague Convention should be revised and supplemented, so as to remove the divergences of opinion and to define more precisely the rights of belligerents over neutral mails, both letter and parcels.

In connection with the general subject of the right of capture the question is worth raising whether the temptation of belligerents to destroy their prizes would not be considerably diminished by the adoption of a rule making it obligatory upon neutrals, to allow belligerents to bring their prizes into neutral ports for the purpose of sequestrating them, pending the decision of a prize court. At present the rules of the Hague Convention leave the whole matter to the discretion of neutrals, and they have shown no disposition to allow such permission, for the reason that it would tend to make their ports veritable bases of naval operations.<sup>2</sup> As is well known, it was the

<sup>1</sup> See my work cited, ch. 34, and Hyde, *op. cit.*, Vol. II, pp. 446-451.

<sup>2</sup> During the World War, the governments of Brazil and Uruguay appear to have been the only ones whose neutrality proclamations authorized the bringing of prizes into their ports for the purpose of sequestration. The U. S. government, in the case of the *Appam*, refused to allow it.

refusal of this permission which the commanders of Confederate cruisers and privateers during the American Civil War alleged as a justification for their systematic policy of prize destruction, and it afforded a similar excuse for the German policy of wholesale destruction during the World War. Belligerents circumstanced as the Southern Confederacy and Germany were, with their home ports blockaded and neutral ports closed to them, will always be under a strong temptation to destroy their prizes and the temptation will probably be stronger in the wars of the future than it has been in the past. Under these circumstances, would not the general interests of both belligerents and neutrals be subserved in a larger degree by such a policy as I have suggested, than by one which encourages and leads inevitably to wholesale destruction of both enemy and neutral prizes by naval commanders without the safeguards of a judicial trial? Such appears to be the view of the Grotius Society of England, which at its meeting in 1918 adopted a recommendation that belligerent warships should be permitted to bring into neutral ports their prizes (if merchantmen) both enemy and neutral, the same to be interned until the end of the war. While belligerent prize courts were not to be allowed to sit within the jurisdiction of the neutral state, they might within their own territory sit in judgment on such cases during the continuance of the war, provided the ships' papers and witnesses could be brought before them. The proposed rule expressly declared that neutral states allowing captured merchantmen to be thus brought into their ports should not be considered as having violated their neutral obligations.<sup>1</sup>

Regarding the right of belligerent warships to make repairs and take on supplies, especially of coal, in neutral ports, the

<sup>1</sup> *Grotius Society, Transactions*, Vol. IV., p. 1. Compare also Fauchille, *op. cit.*, p. 736, and Hyde, *op. cit.*, Vol. II, sec. 861. See also the remarks of Sir Graham Bower in the 30th *Report of the Int. Law Assoc.*, 1921, vol. I, p. 168., who favors the proposal as a means of removing the excuse for sinking prizes.

existing rules are not entirely satisfactory and might very well be revised in the interest of a more genuine neutrality. The Hague Convention allows repairs to be made which are absolutely necessary to render warships seaworthy, but it makes no distinction between repairs of injuries resulting from battle and repairs necessitated by accident or other causes. Neutrals are therefore free to permit a battleship which has been damaged in a naval engagement to make such repairs as may be necessary to render it seaworthy. Having completed them it may leave the port, engage in hostilities, and return again and repair its injuries, thus making the neutral port in fact a repair shop, if not a base of operations. It is a fair question for consideration whether such a privilege should not be restricted or abolished altogether.<sup>1</sup> Likewise, the events of the World War revealed the inadequacy of the existing Hague regulations regarding the privileges of warships to take on coal supplies in neutral ports. The thirteenth convention allows them to take a sufficient supply to enable them to reach the nearest home port in their own country. But, as I pointed out in a previous lecture, this privilege was repeatedly abused during the late war by European war vessels operating in the South Atlantic and Pacific oceans, by taking on sufficient supplies to enable them to return to their own far-distant ports and thereafter engaging in operations in neighboring seas. By returning again and again to neutral ports for fresh supplies without ever visiting a home port, the neutral ports were virtually made bases of naval operations. The policy of various Latin-American governments in limiting this privilege to the taking of such quantity of supplies as would enable the vessels to reach the nearest port of a *neutral country* having a coal depot, was entirely in accord with the spirit of a more genuine neutrality, and might very

<sup>1</sup> Compare the conclusions of Hyde, *op. cit.*, vol. II, sec. 860. As to the present practice see *U. S. Naval War College, Int. Law Sits.* 1924, pp. 40 ff. and an article in 8 *Rev. Gén.* po. 359, ff.



well be made a binding conventional rule. The same restriction might be applied equally to merchant vessels, as some of the Latin-American governments did in fact, for it was found that such vessels frequently procured sufficient quantities of coal to take them to a home port, whereupon they delivered it to warships of their own country in nearby waters. On the whole, it is believed that the license which the existing rules allow in respect to the taking of fuel supplies in neutral ports is excessive and should be restricted, so as to prevent neutral ports from being made what amounts to bases of naval operations.<sup>1</sup> The question is also worthy of serious consideration whether a more genuine neutrality does not require the absolute exclusion of belligerent warships from neutral ports for any or all purposes, except in case of emergency, as the governments of the Netherlands, Norway, and Sweden actually did during the World War. Sentiment in favor of this somewhat vigorous policy is undoubtedly increasing, and much can be said in favor of it. Whether the rule should be applied equally to merchant vessels armed for purposes of defense, as the Dutch government did, is more doubtful. Regarding the status of commercial submarines there would seem to be no good reason for treating them differently from surface navigating merchant vessels so far as the privilege of entry and sojourn in neutral ports is concerned, except that the privilege of entry might very well be conditioned upon their agreement to refrain from navigating below the surface. The contention of the British and the French governments during the World War that no distinction between commercial and war submarines should be recognized and that so far as their privilege of entry to neutral ports is concerned they should be treated alike, hardly seems justified.

<sup>1</sup> Compare Lawrence, *War and Neutrality in the Far East*, pp. 124-125. As to the regulations and practice regarding the taking on of coal supplies in neutral ports see Lapradelle in *Rev. Gén.*, pp. 532 ff.; and *U. S. Naval War Col., Int. Law. Sits.* 1906, pp. 67 ff. 1910 pp. 10 ff., and 1912 pp. 100 ff.

Regarding the perplexing question raised for the first time during the World War as to the right of merchant vessels to carry armament for the purpose of defense against unlawful attacks, I venture to repeat what I said in a former lecture, that so long as merchant vessels are open to attack and destruction without warning by submarines, the right of carrying armament and of using it for purposes of defense should be allowed, though the necessity is to be deplored, because of the difficulty of determining between armament carried for defense and that intended for offensive purposes and because of the irritating controversies to which the practice will inevitably give rise. In case the employment of submarines for the destruction of merchant vessels should be prohibited as the Washington treaty of 1922 proposes, the excuse and the necessity for arming merchantmen would largely disappear and the practice of arming might therefore be equally forbidden by general agreement.

In this connection, I venture the opinion that the right of belligerents to destroy merchant prizes and especially those of neutral nationality ought to be more precisely defined and restricted. Writers are not lacking who maintain that the sinking of neutral prizes, if not already unlawful, ought to be expressly forbidden. Certainly, if the practice is to be continued, the circumstances under which destruction is allowable should be defined with more precision. The unratified Declaration of London allows a neutral merchantman, carrying contraband, to be sunk, provided the contraband goods amount to at least half the total cargo. In fact, during the World War, German cruisers and submarines sank whenever possible all neutral vessels carrying contraband irrespective of the amount of contraband on board, and often sank them on suspicion without any attempt to verify the character of the cargo. The Germans also maintained that the lack of a prize crew with which to take the vessel into port was a sufficient justification for sinking it, whereas the British government has always refused to admit

this as a valid reason, and the international conventions are silent in regard to the matter. In view of the extension of the doctrine of contraband to include the larger part of merchandise now carried by sea, the German interpretation of the belligerent right of destruction, if admitted, will leave the merchant marines of neutral countries very largely at the mercy of belligerents. As I have pointed out in a previous lecture, several of them were in fact very nearly destroyed during the late war. The rules governing prize destruction should therefore be revised so as to leave no doubt as to the unlawfulness of such wholesale depredations upon neutral commerce.

With regard to the law of blockade certain modifications of the old rules have been made necessary by new inventions and changed conditions, and this necessity, like that relating to the rules concerning contraband, was demonstrated by the events of the World War. With the introduction of the submarine, the aeroplane, the long-range gun, the radio signal, and the powerful search light, it is no longer safe for a blockading squadron to remain stationary and in the immediate offing of the blockaded port. The old cruiser-cordon blockade must therefore give way to the "long range" blockade, and the latter must be recognized as an effective and therefore legal blockade. The American government, while denouncing the British blockade during the World War as illegal for other reasons, readily admitted that the old requirement could no longer be insisted upon. Whether a blockade may be enforced in such a manner as to apply in effect to neutral ports, as the British blockade is alleged to have done during the late war, and whether a belligerent may without violating the rule as to impartiality blockade certain ports of the enemy, leaving others open when it is impossible or dangerous to attempt to blockade them, were questions which provoked much controversy and discussion, and there is need of agreement upon these as upon other questions.

The Anglo-French blockade of Germany during the late war was severely denounced by all Germans from the Imperial

Chancellor down, on the ground that its purpose was to starve the German people into submission, and usually when no other justification could be found for the unlawful acts of their military and naval forces they invoked the right of reprisal against the enemy for his "inhuman and unlawful" attempt to reduce the entire German nation to starvation.<sup>1</sup> But the Germans themselves had long asserted that their army was the "nation in arms," and it was more than ever so during the late war. In view of the conditions referred to above under which the distinction between the civil population and the armed forces has become well-nigh impossible, it is not likely that the right of blockade, any more than the right of siege or bombardment, will be surrendered simply because its effect is to deprive the civil population of its food supply.

The wholesale planting of mines by belligerents outside their territorial waters and the treating of vast portions of the high seas as "barred zones" or "danger areas" constituted, as I pointed out in an earlier lecture, grave infringements upon the ancient principle of the freedom of the seas and upon the long recognized rights of neutrals. The inadequacy of the Hague regulations regarding mine-laying was revealed in a striking manner. Their phraseology, as Sir Ernest Satow pointed out at the Second Hague Conference, is such that they do not, in fact, prohibit the planting of mines in the open seas. They ought therefore to be revised so as to prohibit absolutely belligerents from placing mines outside their own territorial waters or those of the enemy. The claim of belligerents to exclude neutrals from navigating great areas of the high seas or to subject their right of navigation to grievous restrictions was virtually the assertion of a right to treat portions of the high seas as they

<sup>1</sup> See the quotations cited from the speeches of the Imperial Chancellor, in my *International Law and the World War*, Vol. II, p. 336.

treat occupied enemy territory in land warfare.<sup>1</sup> Such a claim should be formally and emphatically condemned by the new rules of maritime warfare.

The late war gave rise to much discussion as to the nature and limits of the doctrine of the so-called freedom of the seas. Each of the principal belligerents accused the other of having destroyed that freedom; neither in fact was entirely guiltless, although both contended that they were fighting for its maintenance. President Wilson, in the second of his fourteen points relative to the conditions of peace, laid down the proposition of "the absolute freedom of navigation upon the seas, outside territorial waters," alike in peace and war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants." Strictly interpreted the proposal of "absolute freedom" would involve the surrender of the right of blockade, the right to intercept the transportation of contraband, the right of search and even the right of capture of private property at sea—in brief, it would put an end virtually to naval warfare. It is not to be assumed that the President contemplated any such extreme measure, but the language he employed was at least open to this interpretation and his proposal did not meet with favor at the hands of the British and French governments. They therefore replied that they must reserve complete freedom of action on the subject when they entered the peace conference. In fact the proposal was never pressed and if it had been there is little likelihood that it would have been accepted. There have been, and there are still, a few writers who advocate the abolition of commercial as distinguished from military blockade,<sup>2</sup> the abolition of restrictions on

<sup>1</sup> Compare de Louter, *La Crise du Droit International*, 26 *Rev. Gén.* p. 97.

<sup>2</sup> The American Institute of International Law, at its session at Havana in January, 1917, adopted a proposed code of maritime neutrality which went to the length of abolishing commercial blockade and of proclaiming the immunity from capture of private property at sea (contraband excepted.)

trade in contraband and the immunity of private property from capture at sea, but they are greatly in the minority, and the events of the World War probably reduced rather than increased their number. Such changes in the rules would, as I have said, virtually put an end to naval war and would place naval powers at a serious disadvantage in comparison with those possessing great military armaments. It is not probable therefore that the former will ever surrender these long recognized rights of putting stress upon the enemy. In view of the increasing disposition to throw overboard the old distinction between the civil population and the armed forces, it is difficult to see on what ground commercial blockades can be justly condemned. Regarding the immunity of private property from capture at sea, the principal argument is that the adoption of the rule would bring the law of capture at sea into harmony with the law of capture in land warfare. But as every one knows, private property is not in reality exempt from seizure on land, as the events of the World War abundantly proved. It may be taken by military commanders whenever, in their judgment, their military necessities require it. It may be taken under the guise of contributions, requisitions, and fines, as it was taken on a large scale during the World War, and the decision of the commander is not reviewable by prize courts, as the capture of private property at sea is. Maritime capture, therefore, is more defensible, when carried out in accordance with the recognized rules of international law, than is capture in land warfare, for the very reason that the validity of captures at sea is determined by the courts. There is some truth therefore in the remark of the layman that "seemingly, the only safe place

Meurer, a German jurist, during the late war denounced commercial blockades as brutal and in defiance of the rights of neutrals. See his *Das Program der Meers-freiheit* p. 60. He and other Germans also advocated abolition of the right of capture of private property. But Triepel and Stier-Somlo admitted that there was no likelihood that the body of states would ever agree, at least to the abolition of commercial blockade. See an article by Hershey entitled "The German Conception of the Freedom of the Seas" in 13 *Amer. Jour.*, pp. 206 ff.

for belligerent private property is at sea."<sup>1</sup> The argument that the capture and confiscation of privately owned ships and cargoes entails an unjust hardship upon private individuals has less foundation in fact than the taking of private property in land warfare, when, as is often the case, no compensation is made to the owners, because ships and cargoes are universally insured and the losses and cost of insurance are borne by the whole body of consumers in the form of the increased prices which they pay.<sup>2</sup> The results of the World War, instead of demonstrating the desirability of exempting private property from capture at sea have probably had the contrary effect.<sup>3</sup>

There is a sense, however, in which the freedom of the seas in time of war should be maintained and respected. They should be free in the sense that the right of blockade, the right to intercept contraband, the right of search, and the right of capture should be exercised in strict accord with the rules of international law, and these rules should be more clearly and precisely defined by international agreement on the basis of just consideration of the rights of both belligerents and neutrals. They should also be free in the sense that belligerents should be prohibited from planting mines in them and from appropriating any portion of them under the guise of "war zones," or

<sup>1</sup> Compare to this effect an address of Admiral Sir Reginald Custance of the British Navy, entitled "The Freedom of the Seas" in *V. Grotius Society Transactions*, pp. 65 ff. Admiral Custance points out that naval warfare is the most humane method of weakening the enemy, when it is conducted in accordance with the rules of international law.

<sup>2</sup> Compare the remarks of Admiral Custance in the address cited, p. 67. De Louter, however, thinks the right of capture of private property at sea ought to be abolished as privateering has been. Art. cited, p. 107.

<sup>3</sup> Compare Barclay, *Collapse and Reconstruction* (p. 186) who remarks that the World War made it clear that in certain cases war can only be brought to an end by economic isolation; and Sir Walter Phillimore, *Three Centuries of Treaties of Peace* (pp. 126 & 169) who points out, as I have done above, that private property on land is not in fact exempt from destruction and capture. He adds that after the experience of the late war it may be safely said that a proposal to exempt private property from capture at sea is not likely to be entertained.

"danger areas" and excluding neutrals from navigating them, or of subjecting the navigation thereof to dangerous restrictions. If maritime war is retained as a recognized legitimate method of injuring the enemy, and there does not seem to be any prospect that it will be otherwise, the freedom of the seas can hardly mean anything more than that which I have indicated.<sup>1</sup>

The World War gave rise to many other controversies involving questions of international law, concerning which the existing conventions are either silent, or as to the meaning of which there is a divergence of interpretation, but which, for want of space, I cannot consider here. The requisition by the governments of Great Britain and the United States of neutral merchant vessels raised a controversy between them and the government of the Netherlands as to whether the ancient right of angary was still in existence, and if so, under what circumstances was its exercise allowable. The question was raised in somewhat different form by the action of several neutral governments, notably Portugal, Italy, and Brazil, in requisitioning merchantmen of belligerent nationality (German) lying in their ports.<sup>2</sup> It was also raised by the demand of Argentina and Chile that they should be allowed to requisition German merchantmen lying idle in their ports in order to meet their

<sup>1</sup> On the general subject of the freedom of the seas, see, in addition to the citations already made, Piggott, *The Freedom of the Seas* (1919); Villeneuve, Trans. *La Liberté Des Mers* (1917); Davison, *Freedom of the Seas*; Fulton, *Sovereignty of the Sea*; Phillimore, *Jour. of the Soc. of Comp. Leg. and Int. Law*, Oct. 1920, pp. 306 ff.; Woolsey, 28 *Yale Law Jour.*, 153 ff.; Gettell, in Duggan (editor), *League of Nations*, ch. 14; Fenwick, 11 *Amer. Pol. Sci. Rev.*, pp. 387 ff.; Anderson and Coudert, *Ann. Amer. Acad. of Pol. and Soc. Sci.*, July, 1917; Hurd, 108 *Fortnightly*, pp. 685 ff.; Hays, 12 *Amer. Jour.*, pp. 283 ff.; Hershey, 13 *ibid.*, pp. 207 ff.; F. L. in Clunet, 1918, pp. 93 ff.; Hirst in *Grotius Society Transactions*, Vol. IV., pp. 26 ff.; Phillimore, *ibid.*, pp. 69-70; and de Louter, 26 *Rev. Gén.*, p. 97.

<sup>2</sup> The matter is discussed in my *International Law and the World War*, Vol. I, pp. 174 ff., where numerous authorities are cited. See also Harley, "The Law of Angary," in 13 *Amer. Jour.*, pp. 267 ff.; Scott, 12 *ibid.*, p. 343; and Oppenheim, *International Law*, II. sec., 365-367.



need for vessels to carry their commerce. But objection was raised by the British government that such a procedure would be in violation of the conventional rules relative to the transfers of flag. In other words, while belligerents might requisition neutral merchant vessels to meet their needs, neutrals could not requisition merchant vessels of belligerent nationality to meet theirs even when such vessels were lying idle in neutral ports. The law in respect to the whole matter of requisition is uncertain and indefinite, and needs to be revised and supplemented. If the belligerent right of requisition is to be retained, the right of neutrals who find themselves deprived of the means of carrying on their necessary commerce to take over and use merchantmen of belligerent neutrality lying idle in their ports, ought to be equally recognized.<sup>1</sup>

There is still no agreement as to the place where a belligerent shall be allowed to convert his merchantmen into auxiliary war vessels, nor is there any agreement as to the test for determining the nationality of a ship whether it is the nationality of the flag which the vessel is entitled to fly or the nationality of the owner. The controversies which arose during the World War over the matter demonstrated the desirability of a common agreement in both questions.

Concerning the right of retaliation and reprisal, the existing law is very uncertain and inadequate. The late war was characterized by numerous and extraordinary assertions of the right. Unlawful acts by various belligerents were again and again justified on the ground of reprisal or retaliation. The alleged unlawful British blockade was so defended; so was the aerial bombardment of undefended towns; and many of the violations of the law committed by the Germans were attempted to be justified on similar grounds. The right of retaliation by belligerents is generally admitted, but there is no agreement as

<sup>1</sup> Compare, Alvarez, *La Grande Guerre Européenne et la Neutralité du Chili*, pp. 261 ff.

to the circumstances under which it is legitimate, and as to the limits within which the right may be lawfully exercised. The frequent recourse to it by belligerents during the late war, often resulting in grave injustice and abuse, demonstrated the need of rules defining more precisely the right and setting limits to its exercise. The doctrine of the British prize courts in the *Leonora* and *Stigstad* cases, that belligerents may in effect direct their retaliatory measures against neutrals, has raised an important question which deserves consideration and international action. The argument in support of it, namely, that if the offending belligerent against which it is directed, has first violated the neutral right and the neutral has been unable to compel respect for the right thus infringed upon, the other belligerent may disregard the law and commit a similar infringement upon the rights of the neutral; that in such a case neutrals have no right to complain against any but the original offender; and that no belligerent can be required or expected to fight at a disadvantage, is not likely to find universal acceptance.<sup>1</sup> The whole matter will have to be considered by a future international conference and some agreement reached as to the circumstances under which the right may be exercised, if it is to be allowed at all, and as to the limitations which ought to be imposed upon its exercise.<sup>2</sup> The question is both

<sup>1</sup> The argument is well stated by Sir Erle Richards in the *British Year Book of International Law* for 1920-21, pp. 31 ff. He defends the right of retaliation against neutrals in such cases. So does Mr. G. G. Phillimore, who remarks that "neutrals must be prepared for the contingency of retaliatory measures by one belligerent against another who is committing a breach of the law of nations, and even if their trade suffers thereby, they must acquiesce in the additional hardships imposed on the other members of the society of civilized nations by the necessities of war, so long as these occupy a position midway between extreme belligerent pretensions, on the one hand, and pedantic neutral claims to immunity, on the other." *Grotius Society Transactions*, Vol. IV, p. 70.

<sup>2</sup> Sir Erle Richards in the article cited above suggests as a possible solution the creation of an international commission to inquire into the occasions upon which the right may be exercised. He also suggests

a delicate and a fundamental one; the right asserted by the British prize courts, if admitted without restriction or limitation, will put it within the power of belligerents to override the whole protection which the common law of nations has sought to provide for the benefit of neutral commerce.

The frequency with which the vague and undefined law of military necessity was invoked by belligerents during the World War as a justification for acts in violation of the law and the exaggerated interpretation placed upon it, especially by the Germans, raises the question whether, like the right of reprisal, it cannot be more precisely defined, and the circumstances under which it justifies disregard of the rules of international law, more definitely determined.<sup>1</sup> The assertion of German jurists that necessity knows no law and that the obligation of belligerents to observe the law ceases when observance thereof would hinder the attainment of the object of the war,<sup>2</sup> if carried to its logical conclusion would lead to the very negation of international law.<sup>3</sup> The fact is, the German jurists in their discussion of the subject in connection with their defense of the invasion of Belgium entirely confused military necessity with mere strategical interest and military convenience, which is likely to be the case so long as the doctrine remains in its present vague and undefined state. Their distinction between *Kriegsmanier* and *Kriegsraison*, admittedly defensible within certain limits, has been exalted into a system which converts the exception into a rule.<sup>4</sup> As thus interpreted *Kriegsraison*, in effect, enables belligerents to dispense with the conventional

whether some agreement may not be reached for the imposition of penalties for the violation of the right of retaliation (p. 33).

<sup>1</sup> Compare Alvarez, *Le Droit International de l'Avenir*, p. 131.

<sup>2</sup> The views of various German jurists on this point are quoted in my *International Law and the World War*, Vol. II, pp. 196-7.

<sup>3</sup> Compare De Visscher, *Belgium's Case: A Juridical Inquiry*, pp. 20-21; also his *La Belgique et les Juristes Allemands*, pp. 32 ff., and his article in the *Rev. Gén.*, 1917, pp. 74 ff.

<sup>4</sup> Compare Westlake, *International Law*, Vol. II, p. 116; also his *Collected Papers on International Law*, pp. 243-247.

rules of war; the whole theory is therefore a dangerous doctrine and should be definitely eliminated from the science of international law.<sup>1</sup>

Such are some of the more important questions of international war law that have been recently raised, concerning which the law is either uncertain, inadequate, or non-existent. There are many others still, which for lack of space cannot be discussed here. There is an urgent need for revision of the whole body of the laws of war to bring it into harmony with the new and changed conditions and with new conceptions resulting from the experience of recent wars. There are still many divergencies of opinion as to what the law requires and what it forbids; many of the rules upon which there is substantial agreement are illogical or inadequate and concerning many other questions, such as aerial warfare, there is little or no law at all.<sup>2</sup> Writers are not lacking, however, who regard it as a vain effort and a waste of time to attempt to regulate the conduct of war. There are some who maintain that war and law are contradictory terms, that the so-called "law of war" is a sham and that in the stress of conflict it will never be observed by belligerents.<sup>3</sup> Others argue that the interests of belligerents as between themselves and the interests of belligerents and neutrals are too widely conflicting ever to make agreement possible in respect to many questions. Still others hold that even if agreement

<sup>1</sup> Compare Oppenheim, *The Future of International Law*, p. 60.

<sup>2</sup> Compare Lansing, 13 *Amer. Jour.* (1919), p. 639.

<sup>3</sup> Compare the following remarks of Mr. J. H. Ralston: "The last war has simply disclosed the hollowness of our attempts to classify, under international law, what we term the laws of war; nomenclature changes no essential; it cannot make into law the necessary obscenity of war," 15 *Amer. Jour. of Int. Law* (1921), p. 621.

De Louter adopts a somewhat similar view. War, he says, is not a product of law, but an attack upon law; the "law" of war is an "artificial and contradictory conception," and ought as such to disappear forever, and the customary division of international law into the law of war and the law of peace should be abolished, because it "nourishes the error that war constitutes a legitimate status susceptible of a juridical organization." *La Crise du Droit International*, 26 *Rev. Gén.*, pp. 87 and 105.

were possible and a comprehensive code of the laws of warfare were elaborated and adopted by the body of states, it would soon be out of date in consequence of the rapidly changing conditions. In consequence, the rules would be disregarded by belligerents as the Hague conventions were during the late war, and thus the whole body of international law thrown into discredit.<sup>1</sup> These objections, it must be admitted, are not without force, but they are based on the inadmissible assumption that because the ideal—the abolition of war itself—is hardly realizable, the best attainable end—its regulation and humanization—is not worth striving for. There is no reason for assuming that further agreement upon matters about which there is now divergence of opinion is impossible. The large number of conventions adopted by the two Hague conferences, some of the most important of which were ratified by the whole body of states, afford a striking example of the possibilities of agreement. Those who belittle the attempt to regulate the conduct of war by means of rules and conventions as a useless effort overlook the fact that there is no instance in recent wars in which any belligerent denied the binding force of any duly ratified convention or generally established customary rule of international law. They all admitted their obligation to conform to the law, and, as stated in the earlier part of this Lecture, they seldom, if ever, violated the law without alleging some sort of justification, such as the non-conformity of the enemy, military necessity, or other reason. And when all is said that can be said of the alleged breakdown of international law during the late war, the fact remains that the deliberate violations of the law, numerous as they were, have been greatly exaggerated.<sup>2</sup> They were the exceptions

<sup>1</sup> Compare on these points the observations of an anonymous writer in an illuminating article entitled: "The League of Nations and the Laws of War" in the *British Year Book of International Law* for 1920-21, pp. 109 ff. Compare also the views of Alvarez in the *Le Droit International de l'Avenir*, p. 121, and of de Louter, article cited.

<sup>2</sup> It is well to remember that in most of the recent wars the conventions and customary rules of war have, on the whole, been scrupulously

rather than the rule. No one who studies dispassionately the history of the World War, from the point of view of the interpretation and application of international law, can fail to be impressed by the very great influence which the international conventions exerted in restraining the conduct of belligerents and of causing them to respect in some degree the rights of one another and of neutrals. That the character of the war would have been very different had there been no such conventions there is no reason to doubt.<sup>1</sup> It should also be remarked that many of the alleged violations, were not in fact such because there was a difference of opinion as to what the law required or prohibited in many cases and in such cases each belligerent was the judge of his own rights and obligations. The constant charges and counter-charges, protests and counter-protests made by belligerents against one another for alleged violations of the law, and the care that was taken in most cases to answer formally the charges and to publish the same for the information of the public, revealed a sensitiveness to public opinion and a regard for the law which in themselves constituted a striking recognition of the rôle which law plays in the modern warfare. Our conclusion is that the efforts that have been made to regulate the conduct of war have not been in vain, and they should be continued, without relaxation in the

observed. M. Alberic Rolin points out that one of the principal reasons why there were numerous violations of the law of neutrality during the World War was due to the small number and the weakness of neutral powers who were unable to compel respect for their rights 26, *Rev. Gén.*, p. 138.

<sup>1</sup> There are writers, however, like Professor Pillet of Paris, who think the Hague conventions have served no useful purpose. They were, he maintains, condemned even before they went into effect, and he doubts whether it is worth while to revive and endeavor to improve them. It would be better, he thinks, not to attempt to regulate the conduct of war by means of convention, but to leave it to usage. See his article, *La Guerre Actuelle et le Droit des Gens*, 23 *Rev. Gén.*, (1916), pp. 6 ff.

future, all the more so in view of the predicted destructiveness and inhumanity of future wars.<sup>1</sup>

In view of the difficulty in reaching an agreement upon a complete body of rules for the conduct of war and the lack of any adequate means of enforcing the observance of those upon which agreement has already been reached, some writers hold that the attempt to formulate a new code of war law should be abandoned, and the effort of the world directed to the building up and strengthening of the law of peace, so as to remove as far as possible the existing causes of conflict between states. Jurists and statesmen, we are told, have been too much preoccupied with the effort to build up a body of law for the regulation of the conduct of war—law which will not be observed by belligerents and which cannot be enforced upon them—and have allowed themselves to be diverted from the more important task of constructing a system of law and justice for promoting and safeguarding the general peace. In brief the true function of international law should be not the regulation of war but the regulation and promotion of pacific relations between states.<sup>2</sup> This end could be advanced, we are told, by the extension of the domain of international law so as to embrace many relations and activities of international life now regulated by the municipal law of different states according to their own immediate interests and

<sup>1</sup> Compare to this effect Phillimore, *Three Centuries of Treaties of Peace*, p. 9, who pleads for a restatement of the existing laws and agreement upon new laws to "check new developments of inhumanity"; Kuhn, "The Laws of War and the Future," in 30th *Report of the Int. Law. Assoc.* (1921) vol. I, p. 175; Bryce, *Essays and Addresses in War Time*, p. 30; and Rolin, *Les Fossoyeurs du Droit de la Guerre*, in 26 *Rev. Gén.*, pp. 135 ff. Westlake insists upon the value of regulation and advocates "absolute prohibitions, so that methods of warfare which are still disapproved or faintly condemned may gradually be brought under a ban along with poisoned weapons and explosives. *Collected Papers*, p. 281.

<sup>2</sup> Such is the thesis of a writer in the *British Year Book International Law* for 1920-21, pp. 115 ff. Compare also to the same effect Brown in 12 *Amer. Jour.*, p. 163; Woolf, *International Government*, p. 29; Reinsch, *Procs. Amer. Society of Int. Law*, 1921, p. 89.

with little or no regard to the rights and interests of international society as a whole. It must be admitted that the increasing interdependence among states, the breaking down of the barriers to intercourse, the development of a solidarity of interests which know no boundary lines—in brief, the tendency of nationalism to give way to internationalism—has powerfully accentuated the necessity for the enlargement of the domain of international law. But manifestly there are limits beyond which the lines of international regulation can hardly be expected to be pushed. In the present state of public sentiment, few or no states would be willing to abandon to international control and regulation every activity which has an international interest.<sup>1</sup> We may, however, confidently expect to see the domain of international law extended to cover various matters of an international character which are now dealt with entirely by the municipal law of different states, but the process is likely to be slow and gradual, and for a long time at least there will probably remain a wide domain of interests affecting the whole society of states which will continue to be regulated by each state according to its own ideas, standards, and interests.

In the meantime the strengthening and perfection of international law may be promoted along other lines. Its weaknesses, its *lacunae* are well known.<sup>2</sup> Some of them are admittedly serious; others are no more so than those found in the municipal law of every state. Much of the law, especially the law of war, is badly defined; some of its rules are illogical and out of harmony with existing conditions; others are unsettled and, as I have already pointed out, there are still large domains which are unregulated. As yet there are no permanently established international law-making organs and no appropriate agencies for altering the existing rules which have ceased to be in harmony

<sup>1</sup> Compare the observations and criticism of M. Alvarez's *Rapport* by Hershey in 11 *Amer. Jour.* (1917), pp. 392-3; also the remarks of de Lohter, article cited, pp. 80 and 84.

<sup>2</sup> Some of them are dwelt upon by Alvarez in his *Le Droit International de l'Avenir*, chs. 16-17. See also Lansing in 13 *Amer. Jour.*, p. 639.



with present conditions, necessities, and conceptions. Happily, we now have an international judiciary, though its competence is so severely restricted that the results will, in all probability, be a disappointment to those who have longed to see a system of law and justice take the place of force and violence.

Most important of all, international law still lacks an essential constituent element of real law, namely, effective means for enforcing respect for its commands and prohibitions. One of the chief tasks of the future, therefore, is to find appropriate means by which belligerents, specially, may be effectively compelled to respect the commands and prohibitions of the law. As Mr. Root has observed, the civilized world must determine whether what we call international law is to be continued as a mere "code of etiquette" or whether it is to be a real body of law imposing obligations much more definite and capable of enforcement than it has been heretofore.<sup>1</sup> It is believed that the only means by which this difficult task can be achieved is through international co-operation and organization under which the states of the world will agree to employ their joint power to restrain or punish those which violate their international obligations as they are defined by the law. The establishment of the League of Nations, which is organized largely on this principle, represents the most important step yet taken in this direction. A step had already been taken by the Second Hague Conference which undertook to provide a civil sanction for the violation of the laws of war by establishing the liability of belligerents to indemnify individuals for injuries done them in violation of the rules of the Hague Convention respecting the laws and customs

<sup>1</sup> "The Outlook for International Law," *Procs. of the Amer. Soc. of Int. Law*, 1915, p. 4. See also Peaslee, "The Sanction of International Law," 10 *Amer. Jour.*, pp. 328 ff.; Roxburgh's article, same title, 14 *ibid.* pp. 26 ff. Kuhn, "The Laws of War and the Future," 30th *Report of the International Law Association*, 1921, vol. I, pp. 173 ff.; and Woolsey, "Reconstruction and International Law," 13 *ibid.*, p. 189, who concludes: "My conception, then, of reconstruction and international law is of the old system of law with new teeth, so that somehow, sometime, a calculated breach, by individual or by state, will find a penalty."

of war,<sup>1</sup> and it was in pursuance of this provision that the defeated belligerents of the late war were required to make reparation for the damages which they committed in contravention of the law. Unfortunately, however, it provides no means for enforcing the liability against the victorious belligerent, which may be equally guilty of having violated the Hague regulations. The proposal was advocated in many quarters during and immediately after the close of the late war that the principle of personal responsibility of officers and soldiers and even civil functionaries should be made a rule of international law and such persons charged with violations of the laws of war or with responsibility therefor should, when apprehended, be placed on trial before the court of the complaining belligerents.<sup>2</sup> Cases were by no means lacking in fact, in which such offenders were tried and punished, but the practical difficulties in the way of the application of the principle are such that it would not in itself be a sufficient deterrent to violations of the laws of war. As yet none of the international conventions, although they forbid various acts committed in war which, if committed in time of peace, would be punished as crimes, contains any provisions in the nature of penal sanctions.

The proposal of the committee of jurists, which drafted the statute of the Permanent Court of International Justice, for the establishment of an international criminal court for the trial of persons charged with the commission of crimes in violation of the law of nations, merits consideration. If such a court were established and if means could be found by which offenders could be brought before it, there would probably be fewer such crimes in the wars of the future. This and other proposals and efforts indicate the lines along which the solution of the problem is being sought.

The task of reconstructing and increasing the effectiveness of international law raises the question of how far certain of its

<sup>1</sup> Article 3.

<sup>2</sup> Sir Walter Phillimore advocates this procedure, *op. cit.*, p. 167. So does Fauchille, *op. cit.*, sec. 1718.

existing fundamental bases need to be altered. It is now generally admitted that certain changes of this character are desirable, and some of them I have already indicated. The theories of absolute sovereignty and equality of states which have heretofore been recognized as basic principles of international law should be definitely eliminated so that the law will conform more nearly to the facts.<sup>1</sup> The seal of outlawry ought to be placed upon the so-called "right" of conquest and the whole body of states should by solemn agreement declare it to be a binding principle of international law that an unprovoked war, or a war of aggression, or a war growing out of a justiciable dispute for the settlement of which no serious effort has been made, shall constitute an international crime.<sup>2</sup> Under the present system of international law no war can be said to be illegal and therefore a crime, except in so far as the Covenant of the League of Nations condemns wars of external aggression and wars undertaken without attempt at peaceable settlement through arbitration or conciliation. This condemnation, which now has the approval of 52 states, represents an important step in the direction of placing certain classes of wars within the category of international

<sup>1</sup> De Louter observes that the principle of national sovereignty is not an obstacle but an "indispensable instrument" to the progress of international law, although he admits that the false conception of it and the spirit of abuse in which it has been exercised have brought discredit upon it and caused it to be attacked in recent years as an obstacle to the development of international society. Article cited, p. 88.

<sup>2</sup> Such is the proposal of the Hon. Chandler P. Anderson, in 16 *Amer. Jour.* (1922) p. 242. See also J. B. Moore in 9 *Amer. Pol. Sci. Review*, p. 13. The American Committee for the Outlawry of War apparently proposes to go even further and "outlaw" all wars except those of defence against actual or immediate attack. See the pamphlet of Mr. S. O. Levenson, entitled "Outlawry of War" (Chicago, 1921). Compare also the remarks of the Rt. Hon. C. A. McCurdy in the 29th *Report of the International Law Association* (1918) p. 28, who advocates the branding of aggressive war as "nothing but a crime writ large." De Louter adopts a similar view. The author of an aggressive war, he says, "commits the gravest crime against international law because he lays his hand on the juridical construction of the world." He raises the question whether it would not be desirable to limit the benefits of the rules of international law to those who defend the law and refuse them to belligerents. Article cited, p. 108.

crimes, along with piracy, the slave trade, the white slave traffic and others.<sup>1</sup>

But, as M. Alberic Rolin very aptly remarks, the mere branding of wars of aggression as crimes, by all the treatises on international law in the world and by the most solemn international conventions that can be drafted, will not in itself suffice to prevent them.<sup>2</sup> There must be provided, in addition to formal condemnation, organization and machinery for restraining and punishing the violators. The late Mr. W. E. Hall was of the opinion that international law ought to determine the causes for which war may be "justly undertaken," that is, it ought "to make out as plainly as municipal law what constitutes a wrong for which a remedy may be sought at law."<sup>3</sup> The gain would be something, but in the absence of means for restraining states from going to war for other causes than those recognized as just, the principle would amount to little more than a "pious aspiration."

There is now a wide-spread and increasing opinion in favor of a fundamental change in the traditional attitude of states in regard to the violations of international law. The traditional view and practice in the past has generally been to regard breaches of international law by a particular state as being of no concern to other states than the one immediately affected by the breach; in short, they have been treated as analogous to torts under the civil law, that is, as wrongs against only the victim who suffers the specific injury. Other states are "strangers" to the affair; they have no right of intervention for the purpose of preventing the wrong or for compelling reparation;

<sup>1</sup> Mr. Anderson in his proposal referred to above suggests that states should bind themselves by an agreement to declare to an international conference (except against an actual attack) the causes impelling them to take up arms and that they will give respectful consideration to any recommendations made by such conference.

<sup>2</sup> *Les Fossoyeurs du Droit de la Guerre*, 29 *Rev. Gén.*, p. 132.

<sup>3</sup> *International Law* (3rd edit.), p. 63. Compare also Falconbridge in *IV Grot. Soc. Transactions*, p. 211, who asserts that one of the fundamental weaknesses of international law is that it does not prohibit one state from declaring war on another state without just cause.

it is even considered unneutral for them to protest, since it would amount to a claim on their part to sit in judgment on the merits of a controversy between other parties than themselves.<sup>1</sup> Recently this theory has been severely attacked by many reputable jurists on the ground that it is fundamentally wrong in principle. They contend that the theory of municipal criminal law which regards an offense against the law as an injury not merely to the immediate victim, but to the entire community, should be taken over into international law and made one of its fundamental bases. That is to say, violations of international law should be regarded as violations of the rights of all states because the law thus broken was intended for the protection of all and consequently its violation by a particular state is, in effect, an attack upon the rights of all. Other states may be "strangers" to a controversy between two or more of their neighbors as to what the law requires in the particular case, but they cannot be indifferent to a dispute as to whether the law which is applicable thereto shall be respected and observed. They should therefore have an admitted legal right

<sup>1</sup> The traditional attitude is well stated by Mr. Root in his address on "The Outlook for International Law," in *Procs. of the Amer. Soc. of Int. Law*, 1915, pp. 8 ff. Compare also Bluntschli, *Droit Int. Codifié*, sec. 464.

No neutral government, not even those which were signatories to the Hague conventions, protested against the German invasion of Belgium. When a commission representing the Belgian government called on President Wilson and described to him the conduct of the invaders, he declined to express an opinion, on the ground that it would be premature and improper for a neutral government to sit in judgment on the case. *N. G. Times*, September 17, 1914. Ex-President Roosevelt, however, thought the failure of the United States to protest against so flagrant a violation of the Hague convention, to which it was a party, was "the cult of cowardice and the betrayal of a solemn trust." See the *Independent* of Jan. 4, 1915. Federal Judge Holt expressed a somewhat similar opinion. *Ibid.*, Nov. 23, 1914. But later the United States and various other neutral governments protested against such acts as the German deportation of the Belgians, although they were acts which did not affect directly the rights and interests of the protesting governments. The Swiss Federal Council justified its right to protest on the ground of humanity and because the deportations were in violation of the Hague conventions. See my *Int. Law and the World War*, vol. II, 499-500.

to protest against the violation of the law and even to intervene jointly to restrain such violations, in the interest of the maintenance of the law which is their protection as well as the protection of the state immediately injured.<sup>1</sup> Mr. Root, speaking of the old theory remarks: "We have been proceeding upon the underlying theory which obtains in the civil law, using that term in its restricted sense as distinct from the criminal law, that whether one nation breaks its contract with another nation is nobody's concern except the two nations which are the contracting parties. That generally has been the principle applied to all international law; so that if two nations have a controversy, it is an act of impertinence for another nation to interfere in it. You will never have any substantial improvement until we adopt the other theory, and that is, that a controversy of physical violence between any nations is the direct concern of all nations. My feeling about the whole future is that the essential thing is a change of theory."<sup>2</sup> Mr. G. G. Phillimore in an address before the Grotius Society in

<sup>1</sup> Such is the thesis of Mr. Root in the address referred to above.

<sup>2</sup> Address before the American Society of International Law, 1919, *Procs. of the Society*, pp. 17-18. To the same effect see Scott in 10 *Amer. Jour.*, p. 341, who defends the right of protest. Compare also Alvarez, *Le Droit International de l'Avenir*, p. 120; Brown, 12 *Amer. Jour.*, p. 163; Wright 13 *Amer. Pol. Sci. Review*, p. 558; Fauchille, 22 *Rev. Gén.*, p. 410; Article 21 of the American Institute project of "fundamental basis of international law," which declares that "every state may protest against violations of international law, even if the violations do not affect it directly"; and Anderson (16 *Amer. Jour.*, p. 242) who remarks that "the recent war has demonstrated that no nation can be regarded as a stranger in interest to a dispute between other nations, and that every nation is threatened with an invasion of its rights by a breach of the peace between other nations, and consequently all nations are entitled to demand that no nation shall declare war unless it can show adequate cause." Sir Walter Phillimore likewise defends the right of neutrals to remonstrate against violations of the law by belligerents. Every violation of the laws of war, he adds, every breach of the dictates of humanity, is injurious to nations not engaged in war, as well as to nations which are engaged, and it should be made clear that every breach of an international convention by a belligerent is a breach of contract with every other state which is a party thereto. *Three Centuries of Treaties of Peace*, p. 168. Compare also Fiore,

1918 advocated the same change of attitude in regard to violations of international law. The feeling has undoubtedly grown up, he said, that "the intimate relations of the civilized world in modern times with its corresponding interdependence of nations in intercourse with each other, and the more highly developed conscience of the world demand a fresh edition of the law of neutrality; and there is a tendency to expect that states should assume a moral obligation to take positive action as regards the great issues of the struggle which is deciding the future development of the world." And he adds: "It is only following the natural analogy from the mutual relations of individuals that the society of civilized nations should feel an obligation, in case of a fight between certain of its members, to intervene for securing respect for the observance of the established principles of international law, if not for demanding a suspension of hostilities temporarily or finally, for reference of the matter in dispute to an independent tribunal."<sup>1</sup> But such a theory, if carried to its logical conclusion, would lead to the virtual abolition of neutrality, and some writers are prepared to go to this length.<sup>2</sup>

*op. cit.*, (Sec. 50) who says: "whenever a state violates the rules of international law, in its relations with another state, the immediate danger arising from the arbitrary act violates not only the right of the injured state, but also that of the states jointly and severally interested in the legal organization of international society."

<sup>1</sup> *Transactions of the Grotius Society*, Vol. IV, (1918), pp. 43-44.

<sup>2</sup> Compare the following remarks of the Rt. Hon. C. A. McCurdy, K.C., M.P., before the International Law Association at its meeting at Portsmouth, May, 1920 (Report of the 29th Conference, p. 28): "One of the first changes which has to be made in the doctrines of international law, if war is ever to be abolished, if the League of Nations is ever to be a reality, is the entire abolition of all that code which recognizes the rights and privileges of neutrals. If you or I went out of this hall and saw a man beating another man to death, we should know our duty; we should not talk about neutrality; there can be no neutrality in the presence of crime; and the only way in which, so far as I am able to see, there is any practical possibility of abolishing war within, of course, the limited sense in which I have explained those words, is first to convince a majority of the great powers of the world that aggressive war can no longer be regarded as a legitimate method of expanding territories

Whatever may be the merits of the theory pushed to such limits, it is now generally believed that the obligations of non-intervention and neutrality will occupy a less important place in the international law of the future than they have in the past and that they will tend more and more to disappear. The hard lot of neutrals during the last war showed that the advantages of neutrality were hardly greater than the disadvantages, and they are not likely to be more so in the wars of the future. Under these circumstances states will probably show less inclination than they have in the past to remain neutral in wars in which they have no immediate concern. What is more probable they will find it more difficult to remain neutral when they prefer to do so, for the reason that modern wars affect the rights of neutrals in so vital a manner and give rise to so many controversies between them and belligerents that neutrals will tend more and more to be drawn into struggles once begun between other states. It was this condition which, doubtless, led President Wilson to say in his address at Cincinnati on October 26, 1916, "This is the last war of the kind or of any kind that involves the world that the United States can keep out of. I say this because I believe the business of neutrality is over; not because I want it to be over, but I mean this, that war now has such a scale that the position of neutrals sooner or later becomes intolerable." The fact that subsequent to the pronouncement of these words the United States and other

or gratifying ambition; but on the contrary, it can be regarded as nothing but crime writ large; or as a corollary to that doctrine, that in the presence of crime, no self-respecting nation can afford to remain neutral." The speaker quoted Lord Parker as having expressed a similar opinion in the House of Lords in March or April, 1915.

See also Jacobs, *Neutrality versus Justice: An Essay on International Relations* (London, 1917) in which the author undertakes to establish the proposition that the traditional policy of neutrality is utterly incompatible with the maintenance of international peace and justice. See also the work of an Italian writer, Luigi Carnovale, entitled *Why Italy Entered the War* (1917) and his pamphlet *Only by the Abolition of Neutrality can Wars be Quickly or Forever Prevented* (5th ed. Chicago, 1922).



states were drawn into the World War in spite of their efforts to remain neutral, affords further proof of the probable truth of the President's utterance.

Finally, if the new theory of right and duty, discussed above, regarding intervention for the maintenance of international law and justice is adopted, neutrality will receive a still further set back. It is believed that this theory will ultimately be accepted as one of the fundamental bases of international law. Indeed it may be said that it is already accepted by the great majority of states, for it finds a conspicuous place in the Covenant of the League of Nations.<sup>1</sup>

With the increasing solidarity of interests and consequent interdependence of states, the principle laid down by President Wilson that "neutrality is no longer feasible or desirable where the peace of the world and the freedom of its peoples is involved" will tend more to become a principle of international conduct. More and more there will be a shifting of emphasis from the rights of states to duties; from individual to collective responsibility; from national sovereignty to international control; from independence to interdependence and ultimately the law governing the relations of states will tend to become less and less international and more and more supernational.<sup>2</sup>

<sup>1</sup> Notably in Article 11, which declares that any war or threat of war whether affecting immediately any members of the League or not is declared to be a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.

<sup>2</sup> Compare Quincy Wright, 13 *Amer. Pol. Sci. Review*, p. 558; Dickinson, 12 *ibid*, p. 307; Fenwick, 14 *ibid*, p. 482; and Peasley, 10 *Amer. Jour. of Int. Law*, p. 336. Among the new fundamental bases of international law suggested in the project submitted by M. Alvarez to the American Institute of International Law at its session at Havana in 1917 are the following: the obligatory character of its rules; emphasis upon international duty, solidarity, and the general interest; responsibility for infractions; international regulation of all matters of international interest; and the right of all states to protest against violations of international law by particular states. *Acte Finale de la Session de la Havane*, pp. 68-75.

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